1 Motion for Leave to File Complaint, Complaint and Brief in Support of Motion

2 Opposition to Motion for Leave to File Complaint Against the State of Louisiana, and Brief in Support of Opposition

3 Memorandum for the United States in Reply to Louisiana's Brief in Opposition to Motion for Leave to File Complaint

4 Motion for Injunction and Brief in Support of Motion

5 Memorandum for the United States on Maintenance of Status Quo

6 Motion to Dismiss, and Defendant's Opposition to Plaintiff's Motion for Injunction, with Supporting Brief

7 Motion to Dismiss on Jurisdictional Grounds

8 Motion for Entry of Default and for Leave to Proceed ex parte and Brief in Support of Motion

9 Brief for the United States in Opposition to Defendant's Motion to Dismiss on Jurisdictional Grounds

10 Reply Brief of the State of Louisiana on Motion to Dismiss on Jurisdictional Grounds

11 Opposition to Plaintiff's Motion for Entry of Default and for Leave to Proceed ex parte and Supporting Brief

12 Application by Anderson-Prichard Oil Corporation, Lessee of Both Parties, for Extraordinary Relief and for Amendment or Interpretation of Decree

13 Brief in Support of Application by Anderson-Prichard Oil Corporation, Lessee of Both Parties, for Extraordinary Relief and for Amendment or Interpretation of Decree

14 Motion to Dismiss as Moot Application of Anderson-Prichard Oil Corporation for Extraordinary Relief and for Amendment or Interpretation of Decree and Memorandum in Support of Motion

15 Answer of the State of Louisiana

16 Motion by the State of Louisiana to Take Depositions

17 Motion for Judgment and Statement with Respect to Motion

18 Memorandum for the United States in Opposition to Motion by the State of Louisiana to take Depositions

19 Reply to the Motion for Judgment and to the Opposition of the United States to Louisiana's Motion to Take Depositions

20 Motion for Leave to File Intervention, Brief in Support of Motion, and Interveners' Answer

21 Brief for the United States in Support of Motion for Judgment

22 Memorandum for the United States in Opposition to the Motion of the Parishes of St. Bernard, Plaquemines, Jefferson, Iberia and St. Mary for Leave to File Intervention

23 Memorandum for Interveners in Answer to Opposition Memorandum by the United States

24 Brief of the State of Louisiana in Opposition to Motion for Judgment by the United States

25 Appendix to Brief on Behalf of the State of Louisiana

26 Motion for Reconsideration of Order Denying Right of Intervention, and Supporting Brief in Answer to U.S. Brief for Judgment

27 Reply of the State of Louisiana to Brief of the United States on Motion for Judgment ,

28 Brief for the United States in Reply to Louisiana's Opposition to Motion for Judgment, and in Opposition to Louisiana's Motion to Take Depositions

29 Memorandum for the United States Regarding the Motion of the State of Texas for Leave to File a Brief as Amicus Curiae

30 Motion for Leave to File and Brief of the State of Texas, Amicus Curiae

31 Memorandum for the State of Louisiana Regarding the Motion of the State of Texas for Leave to File a Brief as Amicus Curiae, and the Memorandum by the United States in Response Thereto

32 Intervention of the State of Alabama with Supporting Brief

33 Amended Complaint and Statement with Respect to Amended Complaint

34 Separate Answer of the State of Mississippi to Amended Complaint

35 Answer of Defendant the State of Texas to Second Cause of Action

36 Defenses to Amended Complaint

37 Answer of the State of Louisiana to the Amended Complaint

38 Motion for Pretrial Conference and Statement in Support of Motion

39 Answer and Cross-Bill of State of Alabama to Amended Complaint

40 Motions for Judgment and for Dismissal of Cross-Bill Filed by the State of Alabama, and Memorandum in Support of Motions and in Response to Defendants' Motion for Pretrial Conference

41 Answer of the State of Texas to the Motion of the U.S. for Judgment; Motion for Leave to Take Evidence; Motion for Severance and for Separate Trial and Argument; and Statement in Support of Motions and in Reply to Response of the U.S. to Motion for Pretrial Conference

42 Answer of the State of Florida to the Motion of the U.S. for Judgment; Motion for Leave to Take Evidence; and Statement in Support of Motions and in Reply to Response of the United States to Motion for Pretrial Conference

43 Answer of the State of Louisiana to the Motion of the United States for Judgment

44 Answer of Alabama to Motion of United States for Judgment and Motion to Dismiss Cross-Bill

45 Answer of the State of Mississippi to the Motion of the U.S. for Judgment; Motion for Leave to Take Evidence; and Statement in Support of Answer and Motion

46 Memorandum for the United States in Opposition to Motions for Leave to Take Evidence and for Severance

47 Joint Memorandum of the States of Louisiana, Texas, Mississippi, Alabama, and Florida Pertaining to Schedule for Filing of Briefs and Order of and Allotment of Time for Oral Argument

48 Brief for the United States in Support of Motion for Judgment on Amended Complaint

49 Brief for the State of Alabama in Opposition to Motion for Judgment on Amended Complaint

50 Joint Brief for the Defendant States on Common Questions

51 Brief of the State of Texas

N.B. No "Key" numbers will be assigned to briefs filed after August 13, 1958. They shall be introduced by title targets.

Argument—Continued

Page

III. The answer of the State of Texas to the amended complaint raises no genuine issue as to any material fact, and is insufficient in law 187

A. The State of Texas is not entitled to submerged lands and resources measured by the three-league boundary claimed by the Republic of Texas 188

1. The Republic of Texas never effectively established its three-league claim 188

2. The three-league claim of the Republic of Texas was never recognized by the United States 197

(a). Recognition of the Republic of Texas by the United States 197

(b). President Jackson's message of December 22, 1836 201

(c). Conduct of the United States after recognizing the Republic of Texas .. 203

3. The Submerged Lands Act does not grant rights on the basis of boundaries that existed only prior to statehood 207

B. The State of Texas did not have a three-league marginal belt or boundary when it entered the Union 207

1. The Joint Resolution of March 1, 1845, for the annexation of Texas, did not recognize a three-league boundary for the State 208

(a). The terms of the joint resolution for the annexation of Texas 208

(b). The legislative history of the joint resolution for the annexation of Texas 209

(c). Annexation negotiations . 226

(d). Subsequent interpretations 233

Argument—Continued

Page

2. The invariable foreign policy of the United States has been to claim no more than three miles of marginal sea 234
3. When Texas entered the Union it became subject to the foreign policy of the United States..... 234
(a). In general 234
(b). Boundary questions..... 237
C. The Submerged Lands Act did not fix or confirm the national or State boundary at three leagues from the coast of Texas, or grant Texas the submerged lands and resources to that distance 241
D. The Submerged Lands Act did not grant rights in submerged lands or resources seaward of State boundaries..... 241
E. The statements of the President and Attorney General Brownell..... 242
IV. The answer of the State of Mississippi to the amended complaint raises no genuine issue as to any material fact, and is insufficient in law..... 251
A. When Mississippi became a member of the Union it did not have a boundary extending more than three miles into the Gulf of Mexico 252
B. The United States is entitled to an accounting for any sums derived by Mississippi after June 5, 1950, from the disputed area 255
C. Mississippi's other defenses are not valid... 256
1. The Submerged Lands Act did not grant the submerged lands for a distance of three leagues absolutely 257
2. The Submerged Lands Act did not grant rights in submerged lands or resources seaward of State boundaries 257
3. This case does involve inquiry into and application of the foreign

Argument—Continued

Page

policy of the United States regarding the width of the marginal sea 258

V. The answer of the State of Alabama to the amended complaint raises no genuine issue as to any material fact, and is insufficient in law 258

A. Alabama has never had a boundary three leagues from the shore 259

VI. The answer of the State of Florida to the amended complaint raises no genuine issue as to any material fact, and is insufficient in law 261

A. Congress has not approved a boundary for Florida extending more than three miles into the Gulf of Mexico 262

1. In terms, the Act of June 25, 1868, merely admitted Florida to representation in Congress 265

2. As judicially construed, the Act of June 25, 1868, merely admitted Florida to representation in Congress 268

3. The legislative history of the Act of June 25, 1868, shows no intention to approve State constitutional provisions such as the Florida boundary description 270

4. The related reconstruction legislation does not indicate that the Act of June 25, 1868, approved the Florida boundary description 284

(a). The Act of March 2, 1867, did not require congressional approval of everything that might be contained in the State constitutions 285

(b). The Act of March 23, 1867, did not require congressional approval of everything that might be contained in the State constitutions 291

Argument—Continued

Page

(c). The legislative history of the Act of July 19, 1867, shows Congress' understanding that the Act of March 2, 1867, did not require its approval of everything contained in the State constitutions .. 302

(d). The Act of March 11, 1868, puts no different light on the subject 306

(e). An unexpressed intent to approve, by the Act of June 25, 1868, all the provisions of the State constitutions cannot be supplied by reference to the Act of March 2, 1867 306

(f). In the debates on the Act of March 2, 1867, it was said that State boundaries were to remain unchanged 310

5. Acts readmitting other southern States to representation in Congress show no intention to give general approval to their constitutional provisions 311

B. Florida can base no rights beyond the three-mile limit on former Spanish or British claims 313

C. The boundaries referred to by the Submerged Lands Act are fixed at the three-mile limit by international and national law..... 316

VII. The cross-bill of the State of Alabama should be dismissed 317

VIII. The United States is entitled to judgment on the pleadings 319

Conclusion 322

Appendix A:

	Page
1. Excerpt from the Orleans Territory Organic Act, March 26, 1804, 2 Stat. 283	324
2. Excerpt from the Louisiana Enabling Act, February 20, 1811, 2 Stat. 641	324
3. Excerpt from the Act for the Admission of Louisiana, April 8, 1812, 2 Stat. 701	325
4. Excerpt from the Mississippi Enabling Act, March 1, 1817, 3 Stat. 348	326
5. Excerpt from the Alabama Territory Organic Act, March 3, 1817, 3 Stat. 371	327
6. Excerpt from the Alabama Enabling Act, March 2, 1819, 3 Stat. 489	328
7. Excerpt from the Joint Resolution for the Annexation of Texas, March 1, 1845, 5 Stat. 797	329
8. Excerpts from the Joint Resolution for the Admission of Texas, December 29, 1845, 9 Stat. 108	330
9. Excerpt from the Reconstruction Act admitting North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida to representation in Congress, June 25, 1868, 15 Stat. 73	331
10. Excerpts from the Submerged Lands Act, May 22, 1953, 67 Stat. 29, 43 U.S.C., Supp. V, 1301-1315	333
11. Excerpts from the Outer Continental Shelf Lands Act, August 7, 1953, 67 Stat. 462, 43 U.S.C., Supp. V, 1331-1343	338
12. The Republic of Texas boundary act, December 19, 1836, 1 Laws Rep. Tex., p. 133	340
13. The boundary provision of the Florida Constitution of 1868, Fla. Laws (1868), 193, 195; 25 Fla. Stats. Anno., 411, 413	341

Appendix B:

1. Letter from John Foster Dulles, Secretary of State, to Herbert Brownell, Jr., Attorney General, June 15, 1956	342
2. Letter from Christian A. Herter, Acting Secretary of State, to William P. Rogers, Attorney General, May 9, 1958	347
3. Excerpts from the speech of the Honorable Arthur H. Dean, Chairman of the United States Delegation, in the First Committee of the Law of the Sea Conference, Geneva, March 11, 1958	348

Appendix B—Continued

Page

4. Speech of the Honorable Arthur H. Dean, Chairman of the United States Delegation, in the First Committee of the Law of the Sea Conference, Geneva, April 16, 1958 362
5. Statement by the Honorable Arthur H. Dean, Chairof the United States Delegation, at the Law of the Sea Conference, Geneva, April 28, 1958..... 369

Appendix C:

Presidential Proclamation No. 2667, September 28, 1945, 10 Fed. Reg. 12303, 59 Stat. 884..... 371

Appendix D:

Excerpts from the Senate debates on the Submerged Lands Act, showing the congressional intent to grant to the States no rights seaward of their boundaries.... 374

Appendix E:

Excerpts from the Senate debates on the Submerged Lands Act, showing the congressional intent neither to change nor to declare the location of State boundaries beyond the three-mile limit..... 389

Appendix F:

Letter from Luis G. Cuevas, Mexican Foreign Minister, to Percy W. Doyle, British Chargé d'Affaires in Mexico, in reply to the British protest of June 9, 1848, against the boundary provision of Article 5 of the Treaty of Guadalupe Hidalgo 403

Appendix G:

Letter from President James K. Polk to Andrew Donelson, June 15, 1845. Andrew Donelson Papers (Library of Congress), vol. 10, folios 2068-2070..... 405

Appendix H:

Legislative history of reconstruction acts admitting Tennessee, Arkansas, Virginia, Mississippi and Texas to representation in Congress 409
1. Tennessee 409
2. Arkansas 411
3. Virginia 414
4. Mississippi 420
5. Texas 424

CITATIONS

Cases:

	Page
Abby Dodge, The, 223 U.S. 166	182
Alabama v. *Texas*, 347 U.S. 272	30, 36, 46-47
Alleganean, The: Stetson v. *United States*, 4 Moore, *International Arbitrations*, 4332	144
Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288	47
Atlantic Cleaners & Dyers v. *United States*, 286 U. S. 427	54
Baiz, In re, 135 U.S. 403	129, 133
Bernstein v. *Van Heyghen Freres Societe Anonyme*, 163 F.2d 246, certiorari denied, 332 U.S. 772	128
Blacklock v. *United States*, 208 U.S. 75	267
Butler v. *Thompson*, 97 F. Supp. 17, affirmed *per curiam*, 341 U.S. 937	270
Charlton v. *Kelly*, 229 U.S. 447	129
Chicago & S. Air Lines v. *Waterman Corp.*, 333 U.S. 103	127, 129, 132
Chicago etc. R. Co. v. *Acme Freight*, 336 U.S. 465	54
Chinese Exclusion Case, 130 U.S. 581	129, 236
Chy Lung v. *Freeman*, 92 U.S. 275	129, 236
Clark v. *Allen*, 331 U.S. 503	238
Compania Espanola v. *Navemar*, 303 U.S. 68	135
Cooper, In re, 143 U.S. 472	143, 144
Cunard S. S. Co. v. *Mellon*, 262 U.S. 100	102
Dashing Wave, The, 5 Wall. 170	70
De Baca v. *United States*, 36 C.Cls. 407	234
Divina Pastora, The, 4 Wheat. 52	128
Duff Development Co. v. *Kelantan Government*, L. R. (1924) A. C. 797 (H. L.)	131, 136, 138, 140
Duplex Co. v. *Deering*, 254 U.S. 443	54, 55
Engelke v. *Musmann*, L. R. (1928) A. C. 433 (H. L.)	131, 138
Factor v. *Laubenheimer*, 290 U.S. 276	129
Fagernes, The, L. R. (1927) P. 311 (C. A.)	135
Fisheries Case (United Kingdom v. *Norway)*, I.C.J. Reports (1951) 116	194
Fletcher v. *Evening Star Newspaper Co.*, 133 F.2d 395	319
Foster v. *Globe Venture Syndicate*, L. R. (1900) 1 Ch. 811	138
Foster v. *Neilson*, 2 Pet. 253	129, 143, 169
Garvin v. *Diamond Coal & Coke Co.*, 278 Pa. 469	198

Cases—Continued

Page

Grisbadarna Case, Scott, *Hague Court Reports* (1916) 121 195-196
Guaranty Trust Co. v. *United States*, 304 U.S. 126..... 128
Gunn v. *Barry*, 15 Wall. 610 269
Hauenstein v. *Lynham*, 100 U.S. 483..... 238
Henderson v. *Mayor of New York*, 92 U.S. 259..... 129, 236
Hines v. *Davidowitz*, 312 U.S. 52..... 130, 236, 238
Holmes v. *Jennison*, 14 Pet. 540..... 129, 236
Illinois Central R. R. Co. v. *Public Utilities Comm.*, 245 U.S. 493 318
Island of Palmas Case, The (United States v. *The Netherlands)*, Scott, *Hague Court Reports* (Second Series, 1932) 83 191-192
Jones v. *United States*, 137 U.S. 202..... 130, 139, 141, 143
Kennett v. *Chambers*, 14 How. 38 ..... 128, 130, 141, 202
Kinkead v. *United States*, 150 U.S. 483..... 267
Latvian State Cargo and Passenger Steamship Line v. *McGrath*, 188 F.2d 1000, certiorari denied, 342 U.S. 816 ..... 128, 206
Legal Status of Eastern Greenland, The (Denmark v. *Norway)*, 3 Hudson, *World Court Reports* (1932-1935) 170 191
Louisiana v. *Mississippi*, 202 U.S. 1..... 18, 169, 178, 253, 254
Louisiana v. *Mississippi*, 202 U.S. 58..... 179
Lubeck v. *Mecklenburg-Schwerin*, *Annual Digest of Public International Law Cases* (McNair and Lauterpacht, 1925-1926), Case No. 85, p. 114..... 196
Lubeck v. *Mecklenburg-Schwerin*, *Annual Digest of Public International Law Cases* (McNair and Lauterpacht, 1927-1928), Case No. 3, p. 8..... 196
Maret, The, 145 F.2d 431..... 128
Mexico, Republic of v. *Hoffman*, 324 U.S. 30..... 127, 128, 129
Mighell v. *Sultan of Johore*, L. R. (1894) 1 Q. B. 149 (C.A.) 137, 138
Minnesota v. *United States*, 305 U.S. 382..... 318
Muir, Ex parte, 254 U.S. 522..... 135
National City Bank v. *Republic of China*, 348 U.S. 356 129
Oetjen v. *Central Leather Co.*, 246 U.S. 297..... 128, 140
Ohio Oil Co. v. *Thompson*, 120 F.2d 831, certiorari denied, 314 U.S. 658 319
Oklahoma v. *Texas*, 272 U.S. 21..... 196
Pearcy v. *Stranahan*, 205 U.S. 257..... 142, 143

Cases—Continued

Page

Peru, Ex parte, 318 U.S. 578 ..... 127, 128, 129, 134
Pollard v. *Hagan*, 3 How. 212 ..... 177, 254
Richbourg Motor Co. v. *United States*, 281 U.S. 528 54
Rose v. *Himely*, 4 Cranch 241 130
Royal Indemnity Co. v. *United States*, 313 U.S. 289 30
Sir William Peel, The, 5 Wall. 517 70
Sullivan v. *Kidd*, 254 U.S. 433 129
Talbott v. *Silver Bow County*, 139 U.S. 438 172
United States v. *Babcock*, 250 U.S. 328 318
United States v. *Belmont*, 301 U.S. 324 ..... 128, 129, 236, 238
United States v. *Benner*, 24 Fed. Cas. No. 14,568 .. 129, 133, 139
United States v. *C. I. O.*, 335 U.S. 106 54
United States v. *California*, 332 U.S. 19 ..... 26, 27, 59, 102, 130, 144, 145, 146, 148, 165, 179, 182, 187, 197, 236, 320-321, 322
United States v. *Curtiss-Wright Corp.*, 299 U.S. 304 .. 127, 235
United States v. *Great Northern Ry.*, 287 U.S. 144 54
United States v. *John J. Felin & Co.*, 334 U.S. 624 319
United States v. *Lee*, 106 U.S. 196 127
United States v. *Liddle*, 26 Fed. Cas. No. 15,598 ..... 134, 139
United States v. *Louisiana*, 339 U.S. 699 ..... 5, 12, 27, 30, 146, 187, 321
United States v. *Louisiana*, 340 U.S. 899 ..... 5-6, 12, 21, 30, 186, 187, 255
United States v. *Louisiana*, 351 U.S. 978 3
United States v. *Louisiana*, 353 U.S. 980 4
United States v. *Louisiana*, 354 U.S. 515 147
United States v. *Louisiana*, 355 U.S. 945 ..... 5, 11
United States v. *Mine Workers*, 330 U.S. 258 54
United States v. *Ortega*, 27 Fed. Cas. No. 15,971 .. 131, 134, 139
United States v. *Ortega*, 11 Wheat. 467 140
United States v. *Palmer*, 3 Wheat. 610 128
United States v. *Pink*, 315 U.S. 203 ..... 128, 129, 236, 238
United States v. *Rauscher*, 119 U.S. 407 ..... 129-130, 236
United States v. *Reynes*, 9 How. 127 129
United States v. *Shaw*, 309 U.S. 495 318
United States v. *Texas*, 162 U.S. 1 178
United States v. *Texas*, 339 U.S. 707 ... 12, 27, 29, 146, 187, 321
United States v. *Texas*, 340 U.S. 900 ..... 7, 12, 21, 187, 255
Valentine v. *U. S. ex rel. Neidecker*, 299 U.S. 5 ..... 130, 236
Vermilya-Brown Co. v. *Connell*, 335 U.S. 377 . 109, 135, 142-143
White v. *Hart*, 13 Wall. 646 ..... 268, 311
Williams v. *Suffolk Insurance Co.*, 13 Pet. 415 ..... 129, 130, 142, 206
Yazoo Railroad Co. v. *Thomas*, 132 U.S. 174 267

Constitutions, statutes and treaties:

Constitution of the United States:
Page
Article IV, Sec. 4 270
Fourteenth Amendment 266
Fifteenth Amendment 414, 417, 420
Act of April 30, 1790, Sec. 25, 1 Stat. 112, 117-118..... 133
Act of March 2, 1797, 1 Stat. 497..... 62
Act of April 24, 1800, 2 Stat. 54..... 62
Act of March 26, 1804 (Orleans Territory Organic Act), 2 Stat. 283..... 1, 17, 53, 171, 324
Act of February 20, 1811 (Louisiana Enabling Act), 2 Stat. 641 ..... 1, 17, 171, 172, 176, 253, 324
Act of April 8, 1812 (Admission of Louisiana), 2 Stat. 701 ..... 2, 17, 171, 172, 180, 253, 325
Act of March 1, 1817 (Mississippi Enabling Act), 3 Stat. 348 ..... 2, 20, 176, 252, 326
Act of March 3, 1817 (Alabama Organic Act), 3 Stat. 371 ..... 2, 21, 260, 327
Act of December 10, 1817 (Admission of Mississippi), 3 Stat. 472 ..... 180, 252-253
Act of March 2, 1819 (Alabama Enabling Act), 3 Stat. 489 ..... 2, 21, 176, 260, 328
Act of December 14, 1819 (Admission of Alabama), 3 Stat. 608 ..... 180, 260
Act of March 30, 1822 (Florida Organic Act), 3 Stat. 654 ..... 24, 316
Sec. 9, p. 657..... 62
Act of March 3, 1845 (Admission of Florida), 5 Stat. 742 ..... 24, 180, 316
Act of March 3, 1845, 5 Stat. 750..... 204
Act of December 29, 1845 (Admission of Texas), 9 Stat. 108 ..... 180, 195
Act of September 9, 1850, 9 Stat. 446..... 233
Act of July 24, 1866, 14 Stat. 364 (Joint Resolution H.R. 83, 39th Cong., 1st Sess.) 311, 409
Act of March 2, 1867, 14 Stat. 428... 22, 262, 264, 285, 286, 291, 298, 302, 306, 307, 308, 309, 311, 409, 410
Sec. 5, 14 Stat. 429..... 272, 285, 287, 288
Act of March 23, 1867, 15 Stat. 2 (H.R. 33, 40th Cong., 1st Sess.)..... 264, 291, 292, 301, 306, 308, 309
Sec. 5, 15 Stat. 3..... 292, 293, 308

Constitutions, statutes and treaties—Continued

Page

Act of July 19, 1867, 15 Stat. 14 (H.R. 123, 40th Cong., 1st Sess.) 264, 291, 302, 303
Act of March 11, 1868, 15 Stat. 41 (H.R. 214, 40th Cong., 2d Sess.) 264, 291, 306, 309
Act of June 22, 1868, 15 Stat. 72 (H.R. 1039, 40th Cong., 2d Sess.) 311-312, 411-412
Act of June 25, 1858, 15 Stat. 73 .... 2, 10, 22, 23, 180, 260, 263, 265, 268, 269, 284, 286, 307, 308, 309, 311, 312, 313, 331
Sec. 1 ..... 265, 271
Sec. 2 266
Sec. 3 266
Act of April 10, 1869, 16 Stat. 40 414
Act of December 22, 1869, 16 Stat. 59 266
Act of January 26, 1870, 16 Stat. 62 (H.R. 783, 41st Cong., 2d Sess.), as amended by the Act of February 1, 1870, 16 Stat. 63 ..... 312, 414-416
Act of February 23, 1870, 16 Stat. 67 (H.R. 1096, 41st Cong., 2d Sess.) 312, 420
Act of March 30, 1870, 16 Stat. 80 (H.R. 1536, 41st Cong., 2d Sess.) 312, 424
Act of July 15, 1870, 16 Stat. 363 267
Act of February 18, 1875, 18 Stat. (Pt. 3) 316, 320 63

Alabama Constitution:

(August 2, 1819), Preamble, Dig. Ala. Laws (Toulmin, 1823) 914, 1 Ala. Code (1907) 63 260
(1868), Art. II, Sec. 1, Ala. Code (Keyes, Wood & Roquemore, 1876) 104, 1 Ala. Code (1907) 128 .. 21, 260

Anti-Smuggling Act of 1935, 49 Stat. 517:

Sec. 1(a), 19 U.S.C. 1701(a) 110
Sec. 201, 19 U.S.C. 1401(m) 110
Appropriation Act of March 3, 1837, 5 Stat. 163 198-199
Convention of January 24, 1903, 32 Stat. 1961 68
Convention between Texas and United States, April 25, 1838, 8 Stat. 511 ..... 182-183, 185, 186, 203

Criminal Code (Mar. 4, 1909):

Sec. 14, 35 Stat. 1090 63
Sec. 341, 35 Stat. 1153 63

Constitutions, statutes and treaties—Continued

Page

Escurial (Madrid) Treaty between Great Britain and Spain, October 28, 1790, *British and Foreign State Papers, 1812-1814*, Vol. I, Pt. I, 663, 665-666 ..... 17, 161
Art. III 162
Art. IV 162, 163
Florida Constitution (1868), Art. I, Fla. Laws (1868) 193, 195, 25 Fla. Stats. Anno. 411, 413, 2, 180, 262, 263, 286, 341
Florida Constitution (1885), Art. I, 1 Fla. Stat. (1955) 1, 3, 25 Fla. Stats. Anno. 449, 717 263
Georgia Constitution, Article V, Sec. 17, S. Exec. Doc. No. 57, 40th Cong., 2d Sess., 14 ..... 268, 271
Guano Islands Act, August 18, 1856, 11 Stat. 119, 48 U.S.C. 1411-1419 ..... 109, 143
Joint Resolution for Annexing Texas to the United States, approved March 1, 1845, 5 Stat. 797, 2, 19, 20, 205, 208, 230, 330
Joint Resolution for the Admission of the State of Texas into the Union, approved December 29, 1845, 9 Stat. 108 ..... 2, 330
Louisiana Act 55 of 1938, June 30, 1938, La. Acts (1938), p. 169; 49 La. Rev. Stats. (1950) 1-3 ..... 28, 177
Louisiana Act 33 of 1954, June 21, 1954, La. Acts (1954), p. 63 177
Mississippi Constitution (August 15, 1817), Miss. Rev. Code (Poindexter, 1823), p. 539; Miss. Code (Hutchinson, 1848), p. 23; H. Doc. No. 2, 15th Cong., 1st Sess., p. 5 252
Neutrality Act of June 5, 1794, Section 6, 1 Stat. 381, 384 62
Neutrality Act of April 20, 1818, Section 7, 3 Stat. 447, 449 62
Outer Continental Shelf Lands Act (Pub. L. 212, 83d Cong.), August 7, 1953, 67 Stat. 462, 43 U.S.C., Supp. V, 1331-1343 ..... 2, 6, 43, 108, 116, 338
Sec. 2(a) (43 U.S.C., Supp. V, 1331(a)) 338
Sec. 3 (43 U.S.C., Supp. V, 1332) 338
Sec. 3(a) (43 U.S.C., Supp. V, 1332(a)) 108, 118, 126, 338
Sec. 3(b) (43 U.S.C., Supp. V, 1332(b)) 339
Sec. 4(a) (43 U.S.C., Supp. V, 1333) 107, 339
Sec. 8(a) (43 U.S.C., Supp. V, 1337(a)) 340

Constitutions, statutes and treaties—Continued

Page

Preliminary Convention between Great Britain, France and Spain, November 3, 1762, Art. VI, 15 *Parliamentary History of England*, 1244 161
Revised Statutes (1873) 62
R.S. 5287 63
Submerged Lands Act (Pub. L. 31, 83d Cong.), May 22, 1953, 67 Stat. 29, 43 U.S.C., Supp. V, 1301-1315.. 2, 5, 6, 18, 30, 31, 58, 108, 181, 333 and passim
Sec. 2 (43 U.S.C., Supp. V, 1301) 32, 257, 333
Sec. 2(a) (43 U.S.C., Supp. V, 1301(a)) 32, 47, 51, 263, 334
Sec. 2(b) (43 U.S.C., Supp. V, 1301(b)).. 33, 47, 48, 49, 50, 51, 58, 104, 105, 127, 207, 263, 316, 334
Sec. 2(c) (43 U.S.C., Supp. V, 1301(c)) 253, 334
Sec. 3 (43 U.S.C., Supp. V, 1311) 32, 207, 335
Sec. 3(a) (43 U.S.C., Supp. V, 1311(a)).. 31, 34, 35, 48, 51, 255, 263, 335
Sec. 3(b) (43 U.S.C., Supp. V, 1311(b)).. 32, 51, 255, 256, 263, 335
Sec. 3(c) (43 U.S.C., Supp. V, 1311(c)) 336
Sec. 4 (43 U.S.C., Supp. V, 1312).. 33, 48, 49, 51, 103, 108, 177, 207, 337
Sec. 9 (43 U.S.C., Supp. V, 1302) 34, 120, 337
Tariff Act of 1930, Sec. 581, as amended by the Anti-Smuggling Act of 1935, Sec. 203, 49 Stat. 521, 19 U.S.C. 1581 110
Texas, Act to Define the Boundaries of the Republic of, approved December 19, 1836, 1 Laws, Rep. of Tex. 133 ..... 2, 183, 186, 188, 195, 340
Texas Constitution, 1845, Art. XIII, Sec. 3, H. Doc. No. 2, 29th Cong., 1st Sess., 123; 2 Gammel's Laws of Texas 1293-1294 239
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Treaty, Arbitration, of February 2, 1897, between Great Britain and Venezuela 196
Treaty between France and Spain, November 3, 1762, 13 Cong. Deb. (24th Cong., 2d Sess.), Pt. 2, App. 226.. 159

Page

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Art. V, 9 Stat. 926 ..... 84, 238
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Treaty of Paris (American Independence), September 3, 1783, 8 Stat. 80 173
Treaty of Paris (Louisiana Purchase), April 30, 1803, 8 Stat. 200:
Art. I..... 166
Art. II..... 166
Treaty of San Ildefonso, between France and Spain, October 1, 1800, Art. 3, 8 Stat. 202, 203..... 165
Treaty with Algiers, June 30 and July 6, 1815, Art. 11, 8 Stat. 224, 225 64
Treaty with Cuba, March 4, 1926, 44 Stat. 2395..... 83
Treaty with Germany, May 19, 1924, 43 Stat. 1815..... 82
Treaty with Great Britain, November 19, 1794, Art. XXV, 8 Stat. 116, 128..... 63
Treaty with Great Britain, October 20, 1818, 8 Stat. 248 65
Treaty with Great Britain, January 23, 1924, Art. I, 43 Stat. 1761 82
Treaty with Japan, May 31, 1928, 46 Stat. 2446..... 83
Treaty with Mexico, January 12, 1828, 8 Stat. 372. 184, 185, 203
Art. 1, 8 Stat. 374..... 184
Art. 2, 8 Stat. 374..... 185
Treaty with The Netherlands, August 21, 1924, 44 Stat. 2013 83
Treaty with Panama, June 6, 1924, 43 Stat. 1875..... 82
Treaty with Russia (Alaska cession), March 18/30, 1867, 15 Stat. 539 ..... 68, 144, 174

Constitutions, statutes and treaties—Continued

	Page
Treaty with Spain, February 22, 1819, 8 Stat. 252	185, 200, 203, 316
Art. 2, 8 Stat. 254, 255	315
Art. 3, 8 Stat. 254-256	185
22 U.S.C. 461	63

Miscellaneous:

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Part I, Ch. 2, Topic 4, Title B	110
Sec. 9(c)	111
Sec. 21	111
Sec. 23	110
P. 4	110
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13 Cong. Deb., Pt. I:	
360	199
527-528	199
797	199
986	199
1010-1013	199
1012	198
13 Cong. Deb. (24th Cong., 2d Sess.) Pt. 2:	
App. 226	159
App. 227	161
Cong. Globe, 24th Cong., 2d Sess.:	
45	201
83	199
109	199

Miscellaneous—Continued

Page

Cong. Globe, 24th Cong., 2d Sess.—Continued:
175 199
209 199
210 199
214 ..... 198, 199

Cong. Globe, 28th Cong., 1st Sess.:
652 212
App. 476 204
App. 548 210
App. 549 ..... 199, 210
App. 549-550 200

Cong. Globe, 28th Cong., 2d Sess.:
84-89 209
90-92 209
94-97 209
100-104 209
108-113 209
117-120 209
121-123 209
124-126 209
130-133 209
135-137 209
140-142 209
158-161 209
166-171 209
173 240
173-178 209
180-184 209
183 217
186-194 209
244-248 209
245 220
278-282 209
287 209
292 209
296-300 209
303-305 209
308 209
315-316 209
320-323 209
328-330 209
332-336 209

Miscellaneous—Continued

Page

Cong. Globe, 28th Cong., 2d Sess.—Continued:

341-345 209
346-347 224
350-353 209
358-363 209
371-372 209
App. 41-44 209
App. 42 212
App. 55-62 209
App. 65-68 209
App. 71-73 209
App. 78-114 209
App. 120-128 209
App. 131-134 209
App. 138-159 209
App. 167-171 209
App. 184-199 209
App. 195 ..... 212, 215
App. 200-202 209
App. 212-216 209
App. 213 217
App. 219-227 209
App. 229-238 209
App. 252-256 209
App. 270-277 209
App. 275 212
App. 283-292 209
App. 295-307 209
App. 304 218
App. 309-319 209
App. 321-330 209
App. 333-359 209
App. 336 214
App. 338 214
App. 346-347 209
App. 367-410 209
App. 369-370 213
App. 373 218
App. 387 220
App. 388 220
App. 390 220
App. 400 220

Miscellaneous—Continued

Page

Cong. Globe, 28th Cong., 2d Sess.—Continued:

App. 402 234
App. 410-412 209
App. 411-412 221
Cong. Globe, 31st Cong., 1st Sess., 1540-1542 233
Cong. Globe, 39th Cong., 1st Sess.:
3974-3981 410
3987-4008 410
3989 411
4003 411

Cong. Globe, 39th Cong., 2d Sess.:

1037 ..... 287, 310
1081 310
1206 ..... 287, 310, 311
1215 ..... 287, 310
1315-1340 287
1317-1318 290
1319 ..... 287, 291
1320 ..... 288, 291
1334 288
1356-1358 287
1360-1361 287
1364-1398 287
1384 289
1392 290
1399-1400 287
1440-1469 287
1459 287
1462 288
1469 287
1555-1570 287
1561 291
1625-1633 287
1636-1645 287
1728-1733 287
1969-1976 287
App. 89 311
App. 123-129 287
App. 137-138 287
App. 154-161 287
App. 166-169 287

Miscellaneous—Continued

Page

Cong. Globe, 40th Cong., 1st Sess.:

94 293
101 297
109 293
111 298
160-161 299
166 300
168 301
170-171 293
189-190 293
200 293
214-215 293
481-498 303
571 303
571-573 303
572 304
573 306
586 302

Cong. Globe, 40th Cong., 2d Sess.:

2390-2399 413
2393 413
2397 413
2398-2399 413
2412-2413 270
2413 271
2436-2440 413
2445-2456 270
2446 270
2446-2447 309
2448 ..... 270, 271
2449 270
2461-2466 270
2462 ..... 270, 271
2463-2464 309
2465 ..... 270, 272
2498-2499 270
2517-2518 413
2561-2562 413
2600-2609 413

Miscellaneous—Continued

Page

Cong. Globe, 40th Cong., 2d Sess.—Continued:

2628-2633 413
2659-2668 413
2690-2701 413
2692-2693 414
2697-2698 414
2736-2750 413
2744 414
2750 414
2858 ..... 280, 309
2858-2860 270
2859-2872 309
2861-2872 270
2895-2900 270
2895-2904 309
2901-2904 270
2927-2935 ..... 270, 309
2963-2965 309
2963-2970 270
2968 273
2969 274
2998-3022 270
2999 275
3000 275
3001 277
3004 278
3006 279
3016 271
3018-3022 279
3023-3029 270
3029 280
3052 270
3090 280
3090-3091 271
3090-3096 271
3090-3097 ..... 270, 280
3091 ..... 271, 281
3092 281
3093 283
3094 284
3095 271
3361-3363 413

Miscellaneous—Continued

Page

Cong. Globe, 40th Cong., 2d Sess.—Continued:

3466 270
3484-3485 270
App. 314-315 271
App. 314-316 270
App. 315 271
App. 329-338 270
App. 347-354 270

Cong. Globe, 41st Cong., 1st Sess.:

633-636 420
653-657 420
658-662 420
699-700 420

Cong. Globe, 41st Cong., 2d Sess.:

325 419
325-336 416
350-361 416
360 419
380-394 416
384 419
400-407 416
408-410 416
416-424 416
418 420
430-449 416
458-478 416
478-503 416
479 417
488 417
507-512 416
512-518 416
539-549 416
563-575 416
568 418
569 418
597-614 416
634-644 416
643 418

Miscellaneous—Continued

Page

Cong. Globe, 41st Cong., 2d Sess.—Continued:

715-720 416
1013-1014 420
1173-1174 420
1173-1184 420
1181 423
1209-1219 420
1214 421
1218 422
1252-1261 420
1254 422
1281-1294 420
1322-1335 420
1324-1325 422
1329 424
1331 421
1355-1366 420
1362 423
1701-1703 267
1961 424
1969 424
1969-1971 424
1970 424
2233 ..... 424, 425
2234 424
2271 425
2271-2272 424
2272 424
2281 424
2291-2294 424
App. 44-49 416
App. 52-55 416
App. 57-58 416
App. 59-62 416
App. 69-72 416
App. 117-122 420

99 Cong. Rec.:

2502 44
2503 124
2504 44

Miscellaneous—Continued

Page

99 Cong. Rec.—Continued:

2510 44
2518 124
2525 44
2565 52
2568 44
2569 52
2576 44
2578 44
2616 46
2620 ..... 55, 374
2621 ..... 374, 389
2621-2622 390
2622 104
2630 45
2632 391
2633 391
2694 ..... 256, 375, 392
2694-2695 ..... 45, 376
2695 376
2695-2696 46
2696 392
2698 393
2699 ..... 46, 50, 393
2744 377
2744-2745 377
2746 ..... 46, 378, 394
2754 46
2755 ..... 45, 46, 395
2756-2757 395
2757 ..... 46, 395
2759 379
2773 46
2830 379
2831 46
2832 46
2845 56
2862 46
2880 ..... 46, 379
2881 379
2896 396
2915 380

Miscellaneous—Continued

Page

99 Cong. Rec.—Continued:

2916 397
2923 397
2933 397
2975 ..... 46, 398
2976 ..... 46, 398
2977 381
2985 56
2996-2997 381
3035 398
3037 ..... 52, 399
3050 46
3050-3051 383
3051 386
3052 386
3196 400
3292 46
3532 242
3620 195
3620-3625 94
3621 79
3622 ..... 79, 80
3623 66
3623-3624 85
3865 242
4084-4085 94
4086 125
4094-4095 400
4095-4096 402
4096 ..... 46, 402
4097 387
4098 46
4107-4108 46
4111 46
4112 ..... 46, 387
4113 125
4114 53
4114-4116 ..... 39, 105, 108, 392, 400
4115 105
4116 ..... 53, 58, 106
4160 387
4171-4176 52

Miscellaneous—Continued

Page

99 Cong. Rec.—Continued:
4174-4175 402
4175 ..... 46, 52
4202 388
4358 46
4487-4488 36
4888 118
4891 119
4897 46
7223 116
7232 117
7238 118
7264 116

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Department of State Bulletin of Mar. 24, 1958, p. 461 358
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Federalist, The, Nos. 3, 80 ..... 129, 236

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1875, Pt. I, 641-642 72
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Vol. 2, Case of the United States, 84 144
Vol. 12, Oral Argument for the United States, 107-110 ..... 144, 195

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H. Doc. No. 2, 15th Cong., 1st Sess., p. 5 252
H. Doc. No. 121, 20th Cong., 2d Sess., 259-260 314
H. Exec. Doc. No. 238, 40th Cong., 2d Sess. 309
H. Exec. Doc. No. 324, 42d Cong., 2d Sess., 553 60
H. R. 405, 41st Cong., 1st Sess. 420
H. R. 783, 41st Cong., 2d Sess. 416
H. R. 1058, 40th Cong., 2d Sess. 270
H. R. 1143, 39th Cong., 2d Sess. 287
H. R. 4198, 83d Cong., 1st Sess. 36, 43

Miscellaneous—Continued

Page

H. R. 5134, 83d Cong., 1st Sess. 120

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Letter from Thomas Bayard, Secretary of State, to Daniel Manning, Secretary of Treasury, May 28, 1886, 1 Moore, *Digest of International Law* (1906) 718 ..... 64, 75

Letter from Pierre de L. Boal, chargé d'affaires ad interim in Mexico, to Eduardo Hay, Mexican Foreign Minister, June 3, 1936, 99 Cong. Rec. 3623 ..... 85, 89

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Letter from James Buchanan, Secretary of State, to Mr. Jordan, January 23, 1849, 1 Moore, *Digest of International Law* (1906) 705 ..... 63, 66

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Miscellaneous—Continued

Page

Letter from Pedro Cevallos, Spanish Foreign Minister, to Charles Pinckney and James Monroe, American Envoys, April 13, 1805, *American State Papers*, 2 Foreign Relations 662 167

Letter from Senator Tom Connally, Chairman, Senate Foreign Relations Committee, to Dean Acheson, Secretary of State, October 12, 1949, Senate Interior Committee Hearings on S. J. Res. 13, 83d Cong., 1st Sess., 319 92-93

Letter from Luis G. Cuevas, Mexican Foreign Minister, to Percy W. Doyle, British chargé d'affairs in Mexico, November 17, 1848 ..... 66, 403

Letter from Josephus Daniels, Ambassador to Mexico, to General Eduardo Hay, Mexican Foreign Minister, March 7, 1936, 5 *Foreign Relations of the United States*, 1936, p. 759 ..... 84, 89

Letter from Josephus Daniels, Ambassador to Mexico, to General Eduardo Hay, Mexican Foreign Minister, August 25, 1936, 5 *Foreign Relations of the United States*, 1936, p. 769 ..... 88, 89

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Letter from Augustus C. Dodge, American Ambassador to Spain, to Juan de Zavala, Spanish Foreign Minister,

Miscellaneous—Continued

Page

August 13, 1855, 11 Manning, *Diplomatic Correspondence of the United States, Inter-American Affairs*, 1831-1860 (1939), pp. 878-879 67

Letter from Andrew J. Donelson, chargé d'affaires in Texas, to Secretary of State Buchanan, July 11, 1845, S. Doc. No. 1, 29th Cong., 1st Sess., 101-105 227-229

Letter from John Foster Dulles, Secretary of State, to Herbert Brownell, Jr., Attorney General, June 15, 1956 ..... 101, 132, 342

Letter from President Eisenhower to Senator Clinton P. Anderson and twenty-four other Senators, April 24, 1953, 99 Cong. Rec. 3865 ..... 242-244, 246

Letter from John D. Erwin, Minister to Honduras, to Lainez Espinosa, Honduran Acting Foreign Minister, November 4, 1937, 5 *Foreign Relations of the United States*, 1937, p. 597 89

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Letter from Eduardo Hay, Mexican Foreign Minister, to Josephus Daniels, American Ambassador to Mexico, May 6, 1936, 99 Cong. Rec. 3623 66

Letter from Eduardo Hay, Mexican Foreign Minister, to Josephus Daniels, Ambassador to Mexico, July 8, 1936, 5 *Foreign Relations of the United States*, 1936, p. 764 87-88

Letter from Christian A. Herter, Acting Secretary of State, to William P. Rogers, Attorney General, May 9, 1958 ..... 101, 132 347

Letter from Thomas Jefferson, Secretary of State, to Edmond Genet, French Minister, November 8, 1793, *American State Papers*, 1 Foreign Relations 183 .... 60, 144

Letter from Thomas Jefferson, Secretary of State, to George Hammond, British Minister, November 8,

Miscellaneous—Continued

Page

1793, H. Exec. Doc. 324, 42d Cong., 2d Sess., 553, 1 Moore, *Digest of International Law* (1906) 702 .... 60, 63

Letter from Frank Kellogg, Secretary of State, to American Ambassador to Spain, July 31, 1925, 1 Hackworth, *Digest of International Law* (1940) 639 83

Letter from Philander Knox, Secretary of State, to Mr. Rockhill, American Ambassador to Russia, January 21, 1911, 1 Hackworth, *Digest of International Law* (1940) 634-635 81

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Letter from Timothy Pickering, Secretary of State, to the Lieutenant Governor of Virginia, September 2, 1796, 1 Moore, *Digest of International Law* (1906) 704 63-64

Page

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Miscellaneous—Continued

Page

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Page

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135, 136 186
139-140 201
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509 192
526-529 195
528 fn. 2 196

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1241 161
1244 161
1291 161
1296 191

Presidential Proclamation No. 2667, September 28, 1945, 10 Fed. Reg. 12303, 59 Stat. 884 ..... 120, 124, 137
Proceedings of the Alaskan Boundary Tribunal (S. Doc. No. 162, 58th Cong., 2d Sess.) 68
Procès-verbal of Jacques de la Métairie, April 9, 1682, 2 Margry, *Découvertes et Établissements des Français dans L'Ouest et dans le Sud de L'Amérique Septentrionale* (1877) 186 ..... 155, 156, 157, 158

Page

Proclamation of George III, October 7, 1763 313
Proclamation of René Robert Cavelier de La Salle, April 9, 1682, 2 Margry, *Découvertes et Établissements des Français dans L'Ouest et dans le Sud de L'Amérique Septentrionale* (1877) 191-192 154-155
Protest of the United States to the Russian Government, November 12, 1952, 99 Cong. Rec. 4084-4085 94
Protest of the United States to Saudi Arabia, December 19, 1949, 44 Amer. Jour. of International Law 675 92
Recueil d'Arrests (Amsterdam, 1720) 160
S. Exec. Doc. No. 57, 40th Cong., 2d Sess., 14-15 ..... 268, 271
Report of International Law Commission of the United Nations, eighth session, April 23—July 4, 1956, Article 68, United Nations General Assembly, Official Records, Eleventh Session, Supp. No. 9 (A/3159) 113, 114
S. 131, 40th Cong., 1st Sess. 302, 303
S. 1901, 83d Cong., 1st Sess. 116
S. Doc. No. 174, 26th Cong., 1st Sess. 160
S. Doc. No. 1, 29th Cong., 1st Sess.:

41 231
42 231
46 230
57 ..... 230, 231
58-59 230
61-62 230
64 231
64-65 230
66 231
83 199
87-90 230
91 233
96 233
97 233
99 233
101-105 227
103 229
104 229
106 199

S. Doc. No. 199, 27th Cong., 2d Sess., 59 185

Page

S. Doc. No. 341, 28th Cong., 1st Sess.:
10-13 ..... 204, 211
53-54 ..... 204, 211
56 200

S. Doc. No. 375, 29th Cong., 1st Sess., p. 3 237
S. J. Res. 13, 83d Cong. 36, 44, 54, 55, 108, 242
S. Rept. No. 133, 83d Cong., 1st Sess.:
2 42
2-5 36
5 42
9 ..... 43, 123
13 43
Part 2 55

S. Rept. No. 411, 83d Cong., 1st Sess.:
7 126
15 118

S. Res. 85, 41st Cong., 2d Sess. 416

Senate Committee on Interior and Insular Affairs, Hearings on S. J. Res. 13, 83d Cong., 1st Sess.:
31-32 36-37
34 37
48 ..... 37, 46
49 38
206 38
282 39
319 93
321-323 93
322 90
326 38
1053 121
1056 121
1087 122
1088 122

Senate Committee on Interior and Insular Affairs, Hearings, Part 2 (Executive Sessions), on S. J. Res. 13, 83d Cong., 1st Sess.:
1290 40
1292 40

Miscellaneous—Continued

Page

Senate Committee Hearings—Continued:

1293-1294 41
1297 41

4 Senate Executive Journal 631 201
5 Senate Executive Journal 17 201
Senate Resolution of March 1, 1837, Cong. Globe, 24th Cong., 2d Sess., 214 198
Senate Resolution of July 5, 1867, Cong. Globe, 40th Cong., 1st Sess., 481-498 ..... 302, 303, 306
Speech of Arthur H. Dean, Chairman, U. S. Delegation, in the First Committee of the Law of the Sea Conference, Geneva, April 16, 1958 ..... 97-98, 362
Statement of Herbert Brownell, Jr., Attorney General, Senate Interior Committee Hearings on S. J. Res. 13, 83d Cong., 1st Sess.:

925-926 246
931 248
932 248
937 248
957 249

Statement of Arthur H. Dean, Chairman, U. S. Delegation, U.N. Conference on the Law of the Sea, made in Committee I, March 11, 1958, Dept. of State Bulletin, Vol. 38, No. 980, April 7, 1958, pp. 574-581 ..... 96-97, 348
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Statement of General Eisenhower at New Orleans, Louisiana, October 13, 1952, *New York Times*, October 14, 1952, p. 26 244
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Statement of General Eisenhower at Fort Worth, Texas, October 15, 1952, *New York Times*, October 16, 1952, p. 22 245
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Miscellaneous—Continued

Page

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Statement of Jack B. Tate, Deputy Legal Adviser of the Department of State, Senate Interior Committee Hearings on S. J. Res. 13, 83d Cong., 1st Sess., 1051 ... 148

U. N. Doc. A/2934, p. 16 362

United Nations Conference on the Law of the Sea, February 24–April 28, 1958:

Convention on the Continental Shelf (A/CONF. 13/L.55) 114

Convention on the Territorial Sea and the Contiguous Zone (A/CONF.13/L.52) 116

Resolutions (A/CONF.13/L.56) 100

United States Coast & Geodetic Survey Chart 1116 29

Vattel, *The Law of Nations*, Bk. I, Ch. XXIII, § 289 (Fenwick transl., 3 Classics of International Law ed., 1916, pp. 108-109) 193

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2406 164

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Whitfield's Notes, 3 Fla. Stats. (1941) 224 314

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 11, ORIGINAL

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA AND FLORIDA

BRIEF FOR THE UNITED STATES IN SUPPORT OF MOTION FOR JUDGMENT ON AMENDED COMPLAINT

JURISDICTION

This is a suit between the United States and States. As such, it is within the original jurisdiction of the Court under Article III, Section 2, Clauses 1 and 2, of the Constitution of the United States and 28 U.S.C. 1251(b)(2).

STATUTES INVOLVED

Relevant portions of the following statutes are set out in Appendix A, *infra*, pp. 324-341:

The Organic Act for the Territory of Orleans, March 26, 1804, 2 Stat. 283; *infra*, p. 324;

The Louisiana Enabling Act, February 20, 1811, 2 Stat. 641; *infra*, pp. 324-325;

The Act for the Admission of Louisiana, April 8, 1812, 2 Stat. 701; *infra*, pp. 325-326;

The Mississippi Enabling Act, March 1, 1817, 3 Stat. 348; *infra*, pp. 326-327;

The Organic Act for the Territory of Alabama, March 3, 1817, 3 Stat. 371; *infra*, pp. 327-328;

The Alabama Enabling Act, March 2, 1819, 3 Stat. 489; *infra*, pp. 328-329;

The Joint Resolution for the annexation of Texas, March 1, 1845, 5 Stat. 797; *infra*, p. 330;

The Joint Resolution for the admission of Texas, December 29, 1845, 9 Stat. 108; *infra*, pp. 330-331;

The Act to admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida to representation in Congress, June 25, 1868, 15 Stat. 73; *infra*, pp. 331-333;

The Submerged Lands Act, May 22, 1953, 67 Stat. 29, 43 U.S.C., Supp. V, 1301-1315; *infra*, pp. 333-338;

The Outer Continental Shelf Lands Act, August 7, 1953, 67 Stat. 462, 43 U.S.C., Supp. V, 1331-1343; *infra*, pp. 338-340;

The Act to define the boundaries of the Republic of Texas, December 19, 1836, 1 Laws Rep. Tex., p. 133; *infra*, pp. 340-341;

The Florida Constitution of 1868, Article I, Fla. Laws (1868), 195, 25 Fla. Stats. Anno., 413; *infra*, p. 341.

QUESTIONS PRESENTED

1. Whether the United States is entitled, as against the States of Louisiana, Texas, Mississippi, Alabama, and Florida, to the lands, minerals, and other things underlying the sea more than three geographic miles seaward from the ordinary low-water mark and from

the outer limit of inland waters on their respective coasts and extending seaward to the edge of the continental shelf.

2. Whether the United States is entitled to an accounting by each of the defendant States for any sums of money derived by it after June 5, 1950, from such lands and minerals lying off its coast.

3. Whether the State of Alabama is entitled to maintain a cross-bill against the United States to establish its rights in the submerged lands and minerals underlying the Gulf of Mexico along its coast, and for a declaration of the location of its seaward boundary.

STATEMENT

The United States began this action against the State of Louisiana on December 19, 1955, seeking to establish its right to the submerged lands and minerals underlying the Gulf of Mexico more than three geographic miles from the coast of that State and extending seaward to the edge of the continental shelf, and seeking an accounting for any sums of money derived by the State from that area after June 5, 1950. Motion for Leave to File Complaint, Complaint and Brief in Support of Motion, No. 15, Orig., Oct. Term, 1955. After various preliminary procedures,[a] Louisiana filed its

[a] On May 11, 1956, Louisiana filed suit in a State court against two officials of the United States Department of the Interior and twenty-five oil companies, seeking to quiet title in the State to the submerged lands and resources extending seaward to the 27th parallel (which is from 120 to 180 geographic miles from the shore of Louisiana) and to enjoin the defendants from interfering therewith without consent of the State. On June 11, 1956, this Court enjoined prosecution of that or any other case involving the controversy before the Court here. 351 U. S. 978. The injunction included a prohibition of new leasing or drilling in the disputed area by either the United States or Louisiana, except by agreement filed

answer on November 5, 1956. On December 4, 1956, Louisiana filed a motion to take depositions; and on December 13, 1956, the United States moved for judgment. Briefs were filed on both motions, and argument was heard on April 8, 1957. On May 27, 1957, the State of Texas applied for leave to file a brief as *amicus curiae,* which the Court allowed on June 3, 1957, 353 U.S. 980. On June 24, 1957, the Court held that,

> As a result of its consideration of these matters, including the representations made by the State of Texas in its *amicus curiae* brief, the Court is of the opinion that the issues in this litigation are so related to the possible interests of Texas, and other States situated on the Gulf of Mexico, in the subject matter of this suit, that the just, orderly, and effective determination of such issues requires that they be adjudicated in a proceeding in which all the interested parties are before the Court. [354 U.S. 515.]

The order permitted the States of Texas, Mississippi, Alabama and Florida to intervene or, if they failed to do so, permitted the United States to join them as defendants. Only Alabama intervened within the time allowed, and on November 7, 1957, the United States filed its amended complaint naming the five Gulf States

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with the Court. On October 12, 1956, the United States and the State executed and filed with the Court such an agreement, permitting continued development of the area and providing for the recognition of new leases and the disposition of revenues received pending determination of this litigation. That agreement was modified on January 28, 1957, to correct certain errors, and on April 11, 1957, to change the status of a small area. Both modifications have been filed with the Court.

as defendants. All five have answered; Alabama has additionally designated its answer as a cross-bill, seeking a declaration that it is entitled to the submerged lands and minerals within three leagues of its coast and that its boundary is six leagues from its coast. The United States, on January 20, 1958, moved for judgment and for dismissal of Alabama's cross-bill. Both motions are now before the Court, under the order of March 3, 1958. 355 U.S. 945.

The amended complaint states five separate causes of action against the five defendants. The allegations of the first cause of action, against the State of Louisiana, are the same as in the original complaint, and may be summarized as follows: On June 5, 1950, the United States was entitled, as against Louisiana, to the submerged lands and resources of the Gulf of Mexico lying seaward of the low-water mark and outer limit of inland waters on the coast of Louisiana, and it remains so entitled except to the extent that its rights have been modified by the Submerged Lands Act of May 22, 1953, 67 Stat. 29. Amended Complaint, paragraph II, page 2. On December 11, 1950, this Court entered its decree declaring the United States to be entitled, as against the State, to those submerged lands and resources extending gulfward twenty-seven geographic miles from the low-water mark and from the outer limit of inland waters,[b] enjoining the State from interfering therewith, and requiring it to account for sums derived from that area after June 5, 1950, properly owing to the United States. *United States* v. *Louisiana*, 340 U. S.

[b] Lands more than twenty-seven miles in the Gulf were not then in suit because such lands were not claimed by the State at that time. See *United States* v. *Louisiana*, 339 U. S. 699, 705.

899. Amended Complaint, paragraph III, page 2. Thereafter, the Submerged Lands Act of May 22, 1953, granted to the State the lands and resources under navigable water within the State boundary, extending into the Gulf of Mexico not more than three geographic miles unless the State boundary, as previously approved by Congress or as it existed when the State entered the Union, extended more than three miles, and not more than nine geographic miles in any event. The Act also released all money claims based on operations in the area granted. 67 Stat. 29, 43 U. S. C., Supp. V, 1301-1315. Amended Complaint, paragraph IV, page 3. Louisiana's boundary did not extend more than three miles into the Gulf when the State entered the Union, and Congress has not approved a boundary for the State extending a greater distance. Amended Complaint, paragraph V, page 3. The United States thus remains entitled to the submerged lands and resources beyond the three-mile limit, and to an accounting for the State's receipts therefrom since June 5, 1950. Amended Complaint, paragraph VI, page 4. However, the State asserts an adverse claim, and has not accounted for its receipts. By the Outer Continental Shelf Lands Act of August 7, 1953, Congress declared the existence of an urgent need for development of these resources, and provided for issuance of mineral leases by the Secretary of the Interior. The State, by conduct in assertion of its claim, is interfering with development of the area under that statute, thereby inflicting irreparable injury for which the United States has no adequate remedy but this suit. Amended Complaint, paragraphs VII, VIII, pages 4-5. The original jurisdiction of this Court is invoked because of the need for

a prompt and final determination of the dispute, and because that determination will involve ascertaining and applying the foreign policy of the United States with respect to the width of the marginal sea which it claims—an international question of great delicacy and importance. Amended Complaint, paragraph IX, pages 5-6.

The second cause of action, against Texas (Amended Complaint, pages 6-9), differs only in a few particulars. It cites the Court's order of June 24, 1957, as a basis for jurisdiction. Amended Complaint, paragraph I, page 6; paragraph VIII, page 9. It refers to the decree in *United States* v. *Texas*, 340 U.S. 900, which was identical to the *Louisiana* decree except that it covered the submerged area extending seaward to the edge of the continental shelf. Amended Complaint, paragraph III, page 7. It contains no allegation that Texas has interfered or threatened to interfere in the disputed area.

The third, fourth and fifth causes of action, against Mississippi, Alabama and Florida, respectively (Amended Complaint, pages 10-12, 12-15, 16-18), are like that against Texas, except that there is no allegation of a prior decree against any of these defendants.

The relief sought against all defendants is a declaration of the rights of the United States in the disputed area and an accounting for any moneys derived therefrom by the defendants after June 5, 1950. Amended Complaint, page 19.

Louisiana's answer to the amended complaint alleges that the State was described in the Act of Congress admitting it to the Union as including all islands within three leagues of the coast, that this gave it a maritime

boundary three leagues from the coast, and that in any event it is entitled to the submerged lands and minerals to that distance under the Submerged Lands Act. Answer of the State of Louisiana to the Amended Complaint, paragraphs V, XI (A) and (D), pages 4-5, 8-9, 10. Louisiana denies that any question of foreign policy is involved or can affect its rights under the Submerged Lands Act. Paragraphs IX, X, pages 6-8. It alleges that France and Spain claimed more than three leagues from the coast when they held Louisiana, and that the United States acquired that area by the Louisiana Purchase. Paragraph XI (B) and (C), page 9, incorporating by reference discussion of that point in the Brief of the State of Louisiana in Opposition to the Motion for Judgment by the United States on the original complaint. Louisiana alleges that United States treaties and decisions of this Court have recognized the State's boundary as being three leagues in the Gulf of Mexico (paragraph XI (F) and (G), pages 10-11) and that Louisiana is entitled to a three-league boundary by reason of its "equal footing" with other States whose boundaries are said to have been recognized as being at that distance. Paragraph XI (H), pages 11-12. It makes a general allegation that its boundary extends more than three leagues from the coast, and has been recognized by Congress at least to the extent of three leagues. Paragraph XI (I), page 12. Finally, Louisiana incorporates by a general reference all the defenses asserted in its answer to the original complaint. Paragraph XII, page 12.[c]

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[c] In this brief we do not deal with the defenses pleaded only by that general reference. They were fully discussed in the brief and reply brief of the United States on its motion for judgment on the original complaint against Louisiana.

Texas pleads three alternative grounds on which it claims the submerged lands and resources to a distance of three leagues from its coast. First, it alleges that Texas had a three-league boundary prior to or at the time when it entered the Union or as approved by Congress before May 22, 1953, and that it is therefore entitled to a grant of that extent under the Submerged Lands Act. Answer of Defendant the State of Texas to Second Cause of Action, paragraph IX, pages 3-4. Second, it alleges that the Submerged Lands Act itself fixed the national and State boundary at three leagues from the coast and granted Texas the submerged lands and resources to that distance. Paragraph X, pages 4-5. Finally, it alleges that the Submerged Lands Act granted Texas the submerged lands and resources to a distance of three leagues regardless of the location of the State or national boundary. Paragraph XI, page 5.

Mississippi asserts four defenses. First, it claims that it entered the Union with a six-league boundary, by reason of the Act of Congress describing it as including all islands within six leagues of the coast, and that consequently it is entitled to the submerged lands and resources to a distance of three leagues under the Submerged Lands Act. Separate Answer of the State of Mississippi to Amended Complaint, paragraphs II-VI, pages 1-6. Second, it denies the right of the United States to any accounting whatever. Paragraphs V-VI, pages 4-5. Third, it apparently alleges that the Submerged Lands Act specifically acknowledged and confirmed its ownership of the submerged lands to a distance of three leagues. Paragraph VI, pages 5-6. Fourth, it alleges that the Submerged Lands Act en-

titled it to the natural resources to a distance of three leagues regardless of whether its boundary or ownership of the submerged lands extends so far. Paragraph VIII, page 7. Mississippi also denies that any question of foreign policy is involved. Paragraph VII, pages 6-7.

Alabama alleges that the Acts of Congress under which it was organized as a Territory and entered the Union described it as including all islands within six leagues of the coast, that consequently it then had a six-league marginal belt and so is entitled to the submerged lands for a distance of three leagues under the Submerged Lands Act. Answer and Cross-bill of State of Alabama to Amended Complaint, paragraph IV, pages 2-4. Alabama also alleges that the same boundary was contained in its Constitution of 1868 and so was approved by Congress by the reconstruction act of June 25, 1868, 15 Stat. 73, admitting Alabama to representation in Congress following the Civil War. Paragraph IV, pages 4-5. The State also styles its answer a cross-bill, alleging that the Submerged Lands Act gave an express or implied consent to sue the United States, and seeks a judgment declaring that the State is entitled to the submerged lands within three leagues of its coast and has a boundary six leagues from its coast. Paragraph IV, pages 7-8.

Florida asserts five defenses. First, it denies the Government's allegations that the United States was entitled to the offshore submerged lands on June 5, 1950, and remains so entitled except to the extent that its rights have been relinquished by the Submerged Lands Act; and that Florida did not have a boundary more than three miles from the coast when it entered

the Union or as approved by Congress; and that the United States is consequently entitled to the submerged lands and resources more than three miles from the coast and to an accounting for any sums derived therefrom by the State after June 5, 1950. Defenses [of Florida] to Amended Complaint, pages 2-3. Second, Florida alleges that Congress approved its boundary as extending three leagues in the Gulf of Mexico, by approving the State's constitution and admitting the State to representation in Congress in 1868. Pages 3-4. Third and fourth, Florida alleges that Great Britain and Spain, when they owned Florida, claimed for it a boundary at least three leagues in the Gulf of Mexico, that the United States acquired it from Spain with that extent, and that it had such extent prior to and when it became a member of the Union. Pages 4-6. Fifth, Florida alleges that international law does not limit the marginal sea to a width of three miles, or invalidate the provisions of the Submerged Lands Act. Pages 6-7.

On January 20, 1958, the United States filed its motion for judgment and for dismissal of Alabama's cross-bill. All of the defendants filed responses to the motion for judgment, Alabama also responding to the motion to dismiss its cross-bill. Texas, Florida and Mississippi moved for leave to take evidence, and Texas moved for severance. On March 3, 1958, the Court set for argument the Government's motions for judgment and to dismiss the cross-bill of Alabama. 355 U. S. 945.

SUMMARY OF ARGUMENT

Point I of the Argument sets forth the Government's affirmative case, showing that under the Submerged Lands Act the defendant States are limited to the na-

tional boundary which at all relevant times has been three miles from the coast. Points II through VI discuss the answers of Louisiana, Texas, Mississippi, Alabama and Florida, respectively, showing why we believe all of their defenses to be immaterial or unsound. Point VII is in support of the Government's motion to dismiss Alabama's cross-bill. Point VIII shows that, in the light of the preceding discussion, the United States is entitled to judgment on the pleadings.

I

The amended complaint alleges facts subject to judicial notice which *prima facie* entitle the United States to judgment. In *United States* v. *Louisiana*, 339 U. S. 699, 340 U. S. 899, and *United States* v. *Texas*, 339 U. S. 707, 340 U. S. 900, this Court held that rights in the offshore submerged lands and resources belonged to the United States rather than the States, and directed the States to account for sums received therefrom after June 5, 1950 (the date of the decisions), which were properly owing to the United States. Those decisions are *res judicata* and determine the adjudicated rights of the United States against Louisiana and Texas, except to the extent that rights have been subsequently relinquished. The *Texas* decision established that, as a matter of "equal footing", all States were equally subject to the rights of the United States in offshore submerged lands and resources; consequently, the United States had the same rights against Mississippi, Alabama and Florida as against Louisiana and Texas. The only relinquishment of such rights has been by the Submerged Lands Act. It follows that the only real

issue in this case is to determine the extent of the rights relinquished by that Act.

The Submerged Lands Act granted to the States the submerged lands and resources within their boundaries, together with the past proceeds thereof, but limited the grant to boundaries three nautical miles from the coast or as they existed when the States entered the Union, or as approved by Congress before May 22, 1953 (the date of the Act), but in any event not more than three miles from the coast in the Atlantic or Pacific or three leagues in the Gulf of Mexico. All rights seaward of State boundaries, as so defined and limited, were expressly reserved to the United States. State claims of boundaries beyond those limits, including boundaries claimed only *prior* to statehood, were neither approved nor disapproved; as boundaries, they were left unprejudiced by the Act, but they were not adopted as a measure of the grant of submerged lands. Congress was informed that certain of the Gulf States claimed boundaries more than three miles from the coast, but it did not pass on the validity of those claims, or change or declare the location of the boundaries. It left their actual location to be discovered, in case of dispute, by appropriate judicial processes, wholly unaffected by anything contained in the Act. Thus, the issue here resolves itself into the question of the location of the defendant States' boundaries at the relevant times.

Manifestly, State boundaries cannot extend beyond the national boundary. The national boundary, being a limit on State boundaries, is likewise a limit on the submerged lands grant which Congress measured by State boundaries. The United States has always

championed the principle of freedom of the seas, and has refused to claim for itself or to recognize claims of other nations to boundaries more than three nautical miles from the coast.[4] That policy was begun in President Washington's administration and has been vigorously maintained thereafter. It is attested by a long line of diplomatic history, including treaties and correspondence, corroborating a specific statement of the Government's position made by the Secretary of State for the information of the Court in the present case. The nation's adherence to the three-mile rule has been recognized by this Court and by Congress. The Submerged Lands Act was not a departure from that policy. In allowing the Gulf States the benefit of three-league boundaries *if* such boundaries had already been approved by Congress or had actually existed when the States entered the Union, it did not recognize that any such boundaries in fact did or could exist. It was only a concession to the contention of those States that the question of whether such boundaries already existed should be decided by the Court rather than being foreclosed by Congress. It did not give such boundary claims any better standing than they previously had.

The Outer Continental Shelf Lands Act was not a departure from the United States' adherence to the

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[4] At a recent international conference on the law of the sea, attempting to reconcile conflicting views on that subject, the United States offered to agree to six-mile limits if such a rule could be sure of universal acceptance. See Appendix B, pp. 362 to 369 *infra*. That proposal was made as a compromise, looking to the establishment by agreement of a new rule to have only prospective operation. It was not a relinquishment of the United States' position that three miles is a better limit and has heretofore been the maximum permitted by international law. The six-mile proposal has not been agreed to; unless and until it is, the United States intends to adhere to the three-mile rule as in the past.

three-mile rule. It asserted jurisdiction of the United States over the submerged lands and resources of the entire continental shelf, extending in most places substantially beyond the three-mile limit, but it did not extend the national boundary. It asserted only an extraterritorial jurisdiction of a special and limited character. That is made clear by the terms and history of the Act, and is in accordance with the international law on the subject. Moreover, even if it had extended the national boundary, it clearly did not intend to extend State boundaries; its whole object was to establish exclusive federal jurisdiction over the subject matter. And even if it had extended State boundaries, it gave the States no rights in the submerged lands and resources there. Neither would it have entitled them to such rights under the grant made by the Submerged Lands Act, since it was a later enactment, and the Submerged Lands Act was expressly limited to boundaries already in existence.

The location of the national boundary is a political matter in the field of foreign affairs, to be determined by the political branches of the Government. Their determination regarding it is binding on the courts, and is subject to judicial notice. A formal declaration by the Department of State, such as that here furnished, *infra*, pp. 342 to 347, is the most appropriate source of information on this subject and should be accepted as conclusive. However, we need not rest on this, but refer to a long line of diplomatic history, all of which is subject to judicial notice, by which the position stated by the Secretary is fully corroborated. It is the nature of the question, not the identity of the parties, that makes the matter subject to political determina-

tion and judicial notice. The fact that the United States is a party does not require any different method of ascertaining the facts.

Although the present controversy is wholly domestic, the principal issue must be decided by reference to national foreign policy. It is true that the mineral rights which the United States asserts in the continental shelf could be apportioned between the States and the Federal Government in any way that Congress chose, and that that apportionment would not concern foreign policy or foreign nations. However, Congress has chosen to make the apportionment on the basis of State boundaries; State boundaries cannot exceed the national boundary; and the location of the national maritime boundary is a political and foreign policy question.

In sum, the United States is entitled, under former decisions, to all offshore rights that it has not relinquished; it has relinquished rights only as far out as State boundaries, which could not and cannot exceed the national boundary; and the national boundary is, and has been, at the three-mile limit.

II

Louisiana has never had a boundary more than three miles from the coast in the Gulf of Mexico. Neither France nor Spain, when they possessed Louisiana, claimed or acquired territorial jurisdiction seaward of the shore. La Salle claimed Louisiana for France, extending to the mouth of the Mississippi; his expression of a mistaken opinion that that mouth was at the 27th parallel did not show an intention to claim to that line, which is actually about 120 nautical miles into the Gulf.

Subsequent acts and expressions by France and Spain show that their claim to Louisiana ended at the shore. The Escurial Treaty of October 28, 1790, between Britain and Spain, was not a recognition by Britain of a ten-league boundary for Louisiana. It applied only to the Pacific Ocean and the South Seas, neither of which includes the Gulf of Mexico; moreover, it was not a recognition of territorial boundaries but was only an undertaking to keep British vessels from approaching within ten leagues of Spanish settlements, to prevent smuggling. Regardless of what France or Spain claimed, for purposes of American jurisprudence their actual boundary was where our State Department recognized it as being; and, as we have pointed out, the United States has never recognized any territorial boundary more than three miles in the sea.

The Organic Act for the Territory of Orleans did not describe it as including any marginal sea; it described the Territory only as that part of the territory purchased from France lying south of certain lines. In any event, its boundaries would not be material here, as boundaries existing only prior to statehood are not a measure of the grant made by the Submerged Lands Act.

The Louisiana Enabling Act and Act of Admission, describing the State as bounded by the Gulf of Mexico, "including all islands within three leagues of the coast," did not give the State a water boundary three leagues from the coast. That description meant only that the islands within that distance belonged to the State as separate adjuncts. The State's present three-mile limit derives from the federal three-mile policy and subsequent State action to the extent that it is consistent therewith.

This Court has not heretofore decided the width of Louisiana's marginal belt. *Louisiana* v. *Mississippi*, 202 U. S. 1, did no more than locate the boundary line between those States in the inland waters of Lake Borgne and Mississippi Sound; it expressly left undecided the width of either State's maritime belt in the Gulf of Mexico.

Louisiana's "equal footing" with other States does not entitle it to three leagues of submerged lands under the Submerged Lands Act. We believe that none of the Gulf States has a boundary more than three miles from the coast; in any event, all of them entered the Union after Louisiana. Even if "equal footing" applies to such matters as maritime limits, and even if it could operate to enlarge Louisiana's limits long after its own entry into the Union, still such subsequent enlargement by operation of law would not provide a measure of the benefits granted by the Submerged Lands Act. That Act is limited to boundaries existing when the State entered the Union, or as approved by Congress. Certainly, "equal footing" does not require equality in grants of federal lands to States.

III

The Republic of Texas by statute claimed boundaries extending three leagues into the Gulf of Mexico, but the State of Texas is not thereby entitled to three leagues of submerged lands under the Submerged Lands Act. An international claim of that sort is not effective, as against other nations, unless they expressly recognize it or acquiesce in its exercise for such length of time as to give prescriptive rights. The Texan claim was not recognized by other nations. It does not appear that

it was effectively maintained by actual occupancy, and in any event the Republic only continued in existence for about nine years after the claim was first asserted —too short a period to give prescriptive rights against other nations.

Particularly, the Texan claim was not recognized by the United States, which had never recognized claims beyond the three-mile limit. Political recognition of the Republic of Texas was not a recognition of its boundary pretensions, either inland or in the Gulf. The United States and Texas agreed that their common boundary began "on the gulf of Mexico, at the mouth of the river Sabine, in the sea," and the joint boundary commission established under that agreement fixed the beginning of the boundary "at a mound on the western bank of the junction of the river Sabine with the sea," indicating that the boundary did not extend into the Gulf at all. Circumstances surrounding the unratified annexation treaty of 1844 showed that the United States considered Texas' boundaries unsettled at that time; and an Act of Congress in March 1845, contemporaneous with the Joint Resolution under which Texas was annexed, showed that Congress recognized Sante Fé as being in Mexico although it was within the boundaries claimed by Texas. In any case, the boundaries of the Republic of Texas prior to statehood are not a measure of the grant made by the Submerged Lands Act.

The State of Texas did not have a three-league marginal belt when it entered the Union. The Texan statutory boundary included large areas in the north and west which Texas had never occupied, and the United States was unwilling to assume responsibility

for maintaining those claims. Consequently, the Joint Resolution for annexation was limited to the territory "properly included within, and rightfully belonging to" the Republic of Texas, expressly reserving to the United States the power to settle all questions of boundary that might arise with other nations. This intent specifically appears in the debates on the resolution and in the annexation negotiations with Texas. These reservations must be understood as having applied to the maritime as well as to the inland claims of the Republic of Texas. When Texas entered the Union it necessarily relinquished all control over foreign relations and became subject to the foreign policy of the United States. That policy was well settled to claim no more than three miles from the coast.

President Eisenhower has always insisted that States should have rights in offshore submerged lands and resources within and to the extent of their boundaries. He expressed the opinion that the Texas boundary was three leagues from the coast. It is the position of the Government that the effect of the Submerged Lands Act depends on the actual location of the boundary and that is for the courts to determine. Attorney General Brownell advised Congress that, if the States were to receive mineral rights beyond the three-mile limit, their extent should be graphically delimited, to avoid uncertainties and international complications. Congress did not adopt that suggestion.

IV

Mississippi entered the Union under an enabling act which described it as "including all the islands within six leagues of the shore." As in the case of Louisiana,

that must be understood as a mere identification of islands and not as establishing a water boundary six leagues from the shore. This construction is given added force by the fact that, five years earlier, Congress had given Louisiana islands within three leagues only. It would be strange to find Congress giving the two States different marginal belts, especially at so nearly the same time, and it would be extraordinary to find it increasing them from three to six leagues at the very time when American insistence on the three-mile limit was achieving prominence. Rather, it must be understood that Mississippi's marginal belt was limited to the three miles set by that national policy.

In *United States* v. *Louisiana,* 340 U.S. 899, and *United States* v. *Texas,* 340 U.S. 900, the Court held the United States entitled to an accounting from those States for moneys derived from the offshore areas after June 5, 1950, the date of the opinions in those cases. Those decisions so clearly established the right of the United States to the submerged lands off the coasts of all States that a similar right of accounting should exist, from the same date, against all States. At the least, there should be an accounting from the date of the decision of the present case. The United States has not relinquished its right to such an accounting by the Submerged Lands Act or otherwise, except as to sums derived from the areas granted to the States by that Act.

V

The 1817 Organic Act for Alabama Territory, the 1819 Alabama Enabling Act, and the Alabama Constitution of 1868, under which the State was readmitted

to representation in Congress following the Civil War, all described the State as "including all the islands within six leagues of the shore." As in the case of Louisiana and Mississippi, that should be understood as a mere identification of islands and not as establishing a water boundary six leagues from the shore. The boundary of Alabama, as a territory and as a State, was limited to the national three-mile limit.

VI

The provision of the Florida Constitution of 1868, describing the State boundary as extending to the edge of the Gulf Stream in the Atlantic and three leagues into the Gulf of Mexico, was not approved by Congress. The Act of June 25, 1868, relied on as having given such approval, had no effect but to admit Florida to representation in Congress upon a finding that its constitution had been duly adopted and was republican. That is all that the Act provided in terms; this Court has construed it as having had no greater effect; and its legislative history shows that no general approval of *all* the State constitutional provisions was intended.

The effect of the Act of 1868 is not enlarged by reference to other reconstruction legislation relating to Florida. The preliminary Act of March 2, 1867, as amended, pursuant to which the 1868 Constitution was adopted and submitted to Congress, did provide that the southern States would be readmitted to representation in Congress when they approved the Fourteenth Amendment and adopted constitutions that were republican and in conformity with the Federal Constitution, and when those constitutions were submitted to and

approved by Congress. However, it is evident from the context and from the legislative history of that Act that the "approval" which it contemplated related only to compliance with the specific requirements which Congress had imposed, looking to the establishment of loyal and republican governments. While Congress could reject a constitution which it found objectionable, its mere decision to recognize a constitution as a basis for readmitting a State to representation in Congress was not intended to be the equivalent of affirmative congressional approval of everything contained in the constitution.

The view that the 1868 Act, as shown by its own terms and history, did not approve provisions of the State constitutions such as the Florida boundary description is fully corroborated by the reconstruction legislation relating to other southern States. Nowhere does it appear that Congress considered and approved any provisions of other State constitutions, beyond determining that the constitutions had been duly adopted and were republican. That is to say, the history of the reconstruction legislation as a whole shows that Congress did not intend to undertake the task of examining and approving the State constitutions in all their details.

Florida is not entitled to submerged lands beyond the three-mile limit on the basis of any claims to a wider marginal belt which Britain or Spain made for Florida when they possessed it. It does not appear that either Britain or Spain claimed a marginal belt for Florida at all. Britain described it as bounded "by the Atlantic ocean and the gulf of Florida" and "by the gulf of Mexico," and as "including all islands within six

leagues" of the coast. That should be understood as meaning bounded by the shore and including the islands as separate adjuncts. That description was impliedly adopted by the transfers from Britain to Spain and from Spain to the United States, as well as by the Organic Act for the Territory of Florida and the Act admitting Florida to the Union, all of which identified it by name without any description. The Spanish cession to the United States expressly included the "adjacent islands dependent on said provinces," thereby indicating that the islands were not within the perimeter of Florida. The United States never recognized boundaries beyond the three-mile limit, and acquired Florida subject to its own policy in that respect. As a Territory, Florida was limited by the national policy and could have had no independent policy since it had in that status no independent political existence. In any event, as we have pointed out, boundaries asserted prior to statehood are not, as such, a basis for rights under the Submerged Lands Act.

VII

Insofar as it has the character of a cross-bill, Alabama's pleading should be dismissed. The United States cannot be sued, either by cross-bill or otherwise, without the consent of Congress, which has not been given here. The mere grant to the States of rights in the submerged lands does not imply a consent to sue the United States with respect to those rights, and there is no basis whatever for supposing that Congress consented to suit for an adjudication such as Alabama also seeks, fixing the location of the State boundary beyond the area granted by the Submerged Lands Act.

As to the State's rights in the submerged lands no cross-bill is necessary, since the judgment on the Government's complaint and the State's answer will determine the rights of both parties therein.

VIII

For all these reasons, the United States is entitled to judgment on the pleadings. The complaint alleges facts entitling it to judgment, and those facts are all subject to judicial notice. None of the answers raises material factual issues that cannot be resolved in the same way. In such circumstances it is neither necessary nor appropriate to take evidence. There is no merit to the suggestion that it will defeat the intent of Congress if the case is disposed of in that way. By leaving the location of State boundaries to be determined by the Court, unprejudiced by anything in the Submerged Lands Act, Congress neither improved the status of the States' claims nor changed the judicial techniques by which the questions should be decided. Certainly, Congress did not intend anything so useless as to require this Court to hear evidence of facts which it judicially knows.

After a decree is entered declaring the width of the belt to which the States are entitled, it may be necessary to take factual evidence and enter supplementary decrees to identify all or parts of that area more precisely. However, that cannot well be done until after the width of the marginal belt is determined, for its width will play a large part in deciding what the factual issues will be. For example, any bay with a mouth narrower than twice the width of the marginal belt will automatically belong to the States;

consequently there will be no need, as to such bays, to consider the complicated questions of what sizes and shapes of indentations constitute inland waters. The situation is exactly comparable to *United States* v. *California*, 332 U.S. 19, 26, where the Court entered a decree in general terms, leaving their precise application to subsequent hearings on motion for a supplementary decree.

ARGUMENT

In Point I, *infra*, pp. 27-151, we set forth the Federal Government's affirmative case in support of its claim to the submerged lands and resources more than three miles from the coasts of the defendant States. This consists of a repetition of Point I (pp. 22-81) of the brief filed in support of the Government's motion for judgment on the original complaint, with additional material needed to make it applicable to the new defendants or to meet certain contentions now made by various defendants. In Points II through VI, *infra*, pp. 152-317, we answer separately the defenses asserted by the five separate answers of the five defendants. Point VII, *infra*, pp. 317-319, is in support of the Government's motion to dismiss the cross-bill filed by the State of Alabama. Point VIII, *infra*, pp. 319-322, sets forth the reasons why the United States is entitled to judgment on the pleadings.

I

UNDER THE SUBMERGED LANDS ACT THE DEFENDANT STATES ARE LIMITED TO THE NATIONAL BOUNDARY WHICH AT ALL RELEVANT TIMES WAS THREE MILES FROM THE COAST

A. THE UNITED STATES IS ENTITLED TO ALL RIGHTS IN THE SUBMERGED LANDS AND MINERALS OF THE CONTINENTAL SHELF EXCEPT THOSE THAT IT HAS GRANTED TO THE COASTAL STATES SINCE DECEMBER 11, 1950

In *United States* v. *California*, 332 U. S. 19, this Court held that, as between the United States and the State, the United States was entitled to the submerged lands and minerals underlying the Pacific ocean within three nautical miles of the ordinary low-water mark and outer limit of inland waters along the coast of California. On June 5, 1950, the Court announced similar holdings as to Louisiana and Texas. *United States* v. *Louisiana*, 339 U. S. 699; *United States* v. *Texas*, 339 U. S. 707. The decree entered in the *Louisiana* case on December 11, 1950, included the following (340 U. S. 899-900):

> 1. The United States is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Louisiana, and outside of the inland waters, extending seaward twenty-seven marine miles and bounded on the east and west, respectively, by the eastern and western boundaries of the State of Louisiana. The State

of Louisiana has no title thereto or property interest therein.

* * * * * *

3. The United States is entitled to a true, full, and accurate accounting from the State of Louisiana of all or any part of the sums of money derived by the State from the area described in paragraph 1 hereof subsequent to June 5, 1950, which are properly owing to the United States under the opinion entered in this case on June 5, 1950, this decree, and the applicable principles of law.

The decree entered against Texas on the same day was similar, except that it covered the area extending seaward to the outer edge of the continental shelf. 340 U. S. 900.

Those decrees are *res judicata* as to the rights of the United States at the time, with respect to the submerged lands and resources specified. They must also be considered controlling, by the principle of *stare decisis*, with respect to areas lying farther seaward or off the coasts of other States. Only a distance of 27 miles was involved in the *Louisiana* case because that was then the extent of Louisiana's claim, under Louisiana Act 55 of 1938 (La. Acts 1938, p. 169; 49 La. Rev. Stats. (1950) 1-3). 339 U. S. at 705. However, in explaining its decision, the Court said (*ibid.*):

> If, as we held in California's case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows *a fortiori* that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more

directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea. Certainly it is not less so.

Similarly, in *United States* v. *Texas*, 339 U. S. 707, the Court said of Texan statutes that had purported to extend the State boundary, first to the 27-mile line and then to the outer edge of the continental shelf (339 U. S. at 720): "The irrelevancy of these acts to the issue before us has been adequately demonstrated in *United States* v. *Louisiana*." Clearly those decisions apply equally to the most extreme claim by the defendants, namely, that of Louisiana to a boundary at the twenty-seventh parallel.[1]

It is equally evident that the principle involved is fully applicable to Mississippi, Alabama and Florida, although they were not parties to the previous cases. They, like Louisiana, were created out of federal territories, and their position is in no way distinguishable from Louisiana's so far as ownership of these submerged lands and resources is concerned. Indeed, the decision in the *Texas* case makes it clear that no differences in the history of different States could produce differences in their rights in that respect, since primary federal control of all rights in the offshore submerged lands and resources was declared to be an element of the "equal footing" on which all States enter the Union.

The decrees entered in the *Louisiana* and *Texas* cases required those States to account for moneys derived

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[1] Opposite the coast of Louisiana, the twenty-seventh parallel is at some points more than 60 marine miles south of the 100-fathom depth generally taken as marking the outer edge of the continental shelf. See U. S. Coast & Geodetic Survey Chart No. 1116.

from the subject areas after June 5, 1950, the date of the Court's opinions in those cases. 340 U. S. at 900 and 901. There has, of course, been no such decree against Mississippi, Alabama or Florida. We submit, however, that the holdings in the *Louisiana* and *Texas* cases so plainly established a rule of universal applicability to all coastal States that all were put equally on notice of the rights of the United States, and all should be required to account for any moneys received by them from the same date, except to the extent that the federal claim has been relinquished by the United States.

The rights established in the United States by the 1950 decrees cannot have been lost except pursuant to an act of Congress, which alone has power to dispose of property rights of the United States. *Royal Indemnity Co.* v. *United States,* 313 U. S. 289, 294. The only act of Congress providing for transfer of those rights from the United States to the States is the Submerged Lands Act, 67 Stat. 29, 43 U.S.C., Supp. V, 1301-1315. The present question, then, is simply one of determining the extent of the rights transferred to the States by the Submerged Lands Act.[2]

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[2] In its answer to the original complaint, Louisiana asserted that the effect of the Submerged Lands Act was to nullify the legal theory on which the Court based its decision in *United States* v. *Louisiana*, 339 U.S. 699, 340 U.S. 899. Answer of the State of Louisiana [to original complaint], p. 3. That defense, though not repeated in Louisiana's answer to the amended complaint, is included in the general incorporation by reference of all prior defenses. Answer of the State of Louisiana to the Amended Complaint, p. 12. No other defendant has taken that position, so we do not discuss it in this brief but rest on our former discussion. Brief for the United States in Support of Motion for Judgment [on original complaint], pp. 82-85. In the present brief, we take it for granted that the Submerged Lands Act is to be considered a grant of federal property rights to the States. *Alabama* v. *Texas*, 347 U.S. 272.

B. THE SUBMERGED LANDS ACT GRANTED TO THE COASTAL STATES THE SUBMERGED LANDS AND RESOURCES WITHIN THEIR BOUNDARIES ONLY, BUT DID NOT DETERMINE THE LOCATION OF THOSE BOUNDARIES

1. THE SUBMERGED LANDS ACT EXTENDED ONLY TO SUBMERGED LANDS WITHIN STATE BOUNDARIES

(a). *The terms of the Submerged Lands Act*

The title of the Submerged Lands Act declares in the most explicit way possible that the rights which it confers on the States are limited to the area within State boundaries, and that beyond those boundaries all rights are reserved to the Federal Government. The full title of the Act is (67 Stat. 29; emphasis added):

> An Act to confirm and establish the titles of the States to lands beneath navigable waters *within State boundaries* and to the natural resources within *such* lands and waters, to provide for the use and control of *said* lands and resources, and to *confirm the jurisdiction and control of the United States* over the natural resources of the seabed of the Continental Shelf *seaward of State boundaries*.

The provisions of the Act conform exactly to that description. The extent of the grant made by the Act is established by Section 3, 43 U.S.C., Supp. V, 1311, which, so far as here material, provides (emphasis added):

> (a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters *within the boundaries* of the respective States, and the natural resource within such lands and waters,

and (2) the right and power to manage, administer, lease, develop, and use the *said* lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States * * *;

(b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all *said* lands, improvements, and natural resources * * *.

The foregoing is given specific meaning by the definitions of "lands beneath navigable waters" and "boundaries" contained in Section 2, 43 U.S.C., Supp. V, 1301 (emphasis added):

(a) The term "lands beneath navigable waters" means—

* * * * *

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line *three geographical miles* distant from the coast line of each such State *and to the boundary line of each such State* where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, * * *

* * * * *

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico * * *.

Section 4, 43 U.S.C., Supp. V, 1312, also relates to State boundaries, as follows:

Sec. 4. Seaward Boundaries.—The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend

> beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

Section 9, 43 U.S.C., Supp. V, 1302, makes explicit the federal retention of all that is not granted:

> Nothing in this Act shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 2 hereof, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed.

Since Section 3(a), *supra,* limits the grant to the "lands beneath navigable waters *within the boundaries* of the respective States" (emphasis added), there is no possible room for any contention that the Act gives the States any rights beyond their boundaries. To make doubly certain what is already perfectly explicit, Section 9, *supra,* expressly reserves to the United States all natural resources and the jurisdiction and control thereof seaward of the "lands beneath navigable waters," which means, by definition, seaward of the three-mile limit or the State boundary.

Despite these plain statutory limitations, at least

three of the defendants[3] allege that the Submerged Lands Act gives them the right to exploit the mineral resources of the seabed within three leagues of the coast, even if their boundaries are found not to extend out to that distance. That contention is utterly unsupported by, and wholly inconsistent with, the terms of the Act. It is true that Section 3(a) of the Act (*supra*, pp. 31-32), in addition to giving the States "title to and ownership of" the lands beneath navigable waters within their boundaries, also gives them "the right and power to manage, administer, lease, develop, and use the *said* lands and natural resources" (emphasis added). However, the latter provision does not give them rights beyond their boundaries, but is limited to "said" lands and resources, *i.e.*, those within their boundaries and granted to the States by the preceding clause. The purpose of the second clause was not to give rights in a larger area, but rather to assure that the States should have rights of development even if it should be held for some reason that the transfer of actual title was unconstitutional and void. Such an eventuality was feared by some people because of expressions in this Court's opinions in the *California*, *Louisiana* and *Texas* cases suggesting that the rights of the United States in the offshore area were an inseparable attribute of national sovereignty. Since the Court has now held that the Act is a valid exercise of the power of

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[3] Answer of the State of Louisiana to the Amended Complaint, Par. V, pp. 4-5; Par. X, p. 8 (and possibly Par. XI, p. 8); Answer of Defendant the State of Texas to Second Cause of Action, Par. XI, p. 5; Separate Answer of the State of Mississippi to Amended Complaint, Par. VIII, p. 7. Possibly Florida intends to assert the same point in its Defenses to Amended Complaint (Fifth Defense, p. 7), but this is not clear.

Congress to dispose of federal property, *Alabama* v. *Texas*, 347 U. S. 272, the transfer of rights of development no longer has any practical effect. All such rights are included in the transfer of title. There is no justification for the defendants' attempt to make of that narrower, precautionary provision a transfer of more extensive rights than were included in the transfer of title. Both grants were plainly restricted to the same area—the area within State boundaries.

(b). *The legislative history of the Submerged Lands Act*

The legislative history of the Submerged Lands Act confirms, if confirmation be needed, the plain purpose of Congress to give the States no rights beyond their *boundaries*. At the hearings of the Senate Committee on Interior and Insular Affairs, Senator Holland of Florida, the author of the Act,[4] testified:

> By way of a brief summary, the general purpose of Senate Joint Resolution 13 is to recognize, confirm, establish, and vest in the several States—and this means all 48 of them—the submerged lands and the natural resources therein within their respective boundaries * * *. This joint resolution will confirm to the maritime States—of which there are 20—the rights which they had respectively enjoyed since the founding of our Nation and up to the date of the decision in the California case, in their offshore lands and waters which lie within

[4] The provisions of Senator Holland's bill, S. J. Res. 13, were substituted by Senate amendment for those of H. R. 4198, the designation under which the Act was passed. See S. Rept. No. 133, 83d Cong., 1st Sess., 2-5; 99 Cong. Rec. 4487-4488.

their constitutional boundaries. * * * [Senate Interior Committee Hearings on S. J. Res. 13, 83d Cong., 1st Sess., 31-32.]

* * * * *

This measure does not deal with any of the problems of that vast portion of the Continental Shelf —about nine-tenths of the whole shelf—which lies beyond the States' historic or constitutional boundaries. [*Id.*, 34.]

* * * * *

What we are endeavoring to do is to go back to the old doctrine that there is some such thing as States' rights, which is of great importance in this whole picture, and to go back to the uninterrupted course of 150 years of enjoyment by the maritime States of the fullest use, the fullest production that was then possible under any known assets there to be found of the submerged belts which lay within their historic boundaries. If in the case of Louisiana there is a case for extending it more than 3 miles, the Senator from Florida does not know it. But the language of the bill is perfectly clear in that it is the constitutional boundaries, and it is the historic boundaries, and it is a case of restoration and establishment to States of what lie within their boundaries of jurisdiction, of criminal law and of various other kinds of law, boundaries which fix the venues of cases which arise. We want to get back to the fundamental theory that the States have rights in the assets found in their own areas in these submerged lands. [*Id.*, 48.]

* * * * *

The Senator from Florida is simply trying to confine his presentation and his bill, in which he is joined by 39 other Senators, to the matter of restoring to the States their plenary rights, property, jurisdiction, and control which they exercised without question for 150 years over the areas lying within State boundaries. [*Id.*, 49.]

Other participants in the hearings expressed the same understanding of the bill. Thus, Senator Daniel of Texas said:

The Holland bill simply recognizes the long-established good-faith claims of all of the 48 States and establishes, confirms, and restores to every State in the Union the ownership and control of all of this type of property located within their respective historic boundaries. * * * [Senate Interior Committee Hearings on S.J. Res. 13, 83d Cong., 1st Sess., 206.]

* * * * *

The Holland Bill covers all of the portion of the Continental Shelf lying within original historic State boundaries. These lands would be restored to the States. The Holland bill does not attempt to settle the problem of ownership, management, and control of that part of the Continental Shelf lying outside of original State boundaries. * * * [*Id.*, 326.]

Mr. Fred S. LeBlanc, Attorney General of Louisiana, testified to the same effect:

Senate Joint Resolution 13 does not undertake to delimit in figures the exact historic limits of any

particular State in the marginal sea. The legislation only recognizes the States as owning submerged lands and the resources thereof within historic boundaries such as they were when the States entered the Union, or as such boundaries may have been heretofore or hereafter [5] approved by Congress. [Senate Interior Committee Hearings on S.J. Res. 13, 83d Cong., 1st Sess., 282.]

At the executive sessions of the Senate committee, Senator Daniel again disavowed any intention of seeking rights for the States seaward of their boundaries, and Senator Cordon reported that sentiment in the Senate was very generally opposed to giving any such rights to the States:

Senator CORDON. * * *

* * * the chairman suggests to the committee today that, first, we proceed with legislation affecting the areas within so-called historic State boundaries and with respect to inland navigable waters, and determine what in our view is the proper legislation to recommend to the Senate, and then leave for future, but early, consideration the outer Shelf problem.

Is there any objection to that procedure?

Senator ANDERSON. I do not know that there should be objection raised to that procedure. I think there are many of us who feel that we ought to try to settle the whole thing, and that the States having obtained, if they do obtain by the passage

[5] Reference to approval by Congress "hereafter" (*i.e.*, after enactment of the Submerged Lands Act) was deleted by a floor amendment in the Senate. 99 Cong. Rec. 4114-4116.

of this, title or something else to their historic boundaries, they will be right back in asking for the whole Continental Shelf, whereas if the whole matter was presented at one time they might waive these somewhat nebulous claims to the Continental Shelf. [Senate Interior Committee Hearings, Part 2 (Executive Sessions), on S. J. Res. 13, 83d Cong., 1st Sess., 1290.]

* * * * *

Senator DANIEL. * * *

As to Senator Anderson's statement that the States would be in here claiming ownership of the outer shelf, as you know, I did not propose that. And I will not be in here claiming any ownership beyond our original boundaries or any management of leasing beyond our original boundaries. [*Id.*, 1292.].[6]

* * * * *

Senator CORDON. * * *

It is the conclusion of the Senator from Oregon, although his decision to make this suggestion of division was not predicated upon whether such division would help or injure those 2 States—it was his conclusion from discussions with Members of the Senate, that that division so far as the interests of the 2 States are concerned, will prejudice that interest more than it will aid it. He has found very

[6] Former Senator Daniel, now Governor of Texas, is of counsel for the State of Texas in the present litigation. See Answer of the State of Texas to the Motion of the United States for Judgment, etc., filed February 3, 1958.

little sentiment for even the type of qualified State administration which the chairman himself, in view of what seemed to be the equities, was prepared to go along with. The chairman has never felt that there was any legal right to any State to any values in the Continental Shelf outside the historic boundaries of the States themselves. He has never varied in that view. He still holds it.

Senator ANDERSON. As I do.

Senator CORDON. And in discussing this matter with Members of the Senate, who will be found favorable to the so-called Holland bill approach, that is, the approach of a conveyance, a granting and assigning by the Government of all its interests in the lands and the subsoil under the waters of the seas outside inland waters, and off the coasts of the States and within their historic statutory boundaries, he found a very considerable sentiment, an overwhelming sentiment in opposition to any grant of any administration to the two States over any of the outer Continental Shelf, permissive or otherwise. [*Id.*, 1293-1294.]

* * * * *

Senator ANDERSON. * * * I can see no reason to surrender to these States a part of the title outside historic boundaries.

Senator CORDON. Nobody is asking that. [*Id.*, 1297.]

The report of the Senate committee again clearly brought out that the measure related only to the area

within State boundaries, and gave the States no rights seaward of their boundaries:

> For the convenience of the Members of the Senate, the committee is reporting a clean bill. Therefore, the amendment is to strike out all after the enacting clause and in lieu thereof insert the language set forth below. * * *
>
> * * * The only change of substance is found in section 9, in which the jurisdiction and control of the Federal Government over the natural resources of the seabed of the Continental Shelf seaward of historic State boundaries is confirmed. * * * [S. Rept. No. 133, 83d Cong., 1st Sess., 2.]

* * * * *

> Senate Joint Resolution 13, as amended, determines and declares that it is in the public interest that title and ownership of lands beneath navigable waters within the boundaries of the respective States, and of the resources therein, be established and vested in the respective States. * * *
>
> The measure also provides that in addition to title and ownership, but distinct from them, the States shall have the right and power to manage, administer, lease, develop, and use such lands and natural resources in accordance with the terms of Senate Joint Resolution 13 and applicable State law, and whatever rights the Federal Government may have in such management and administration are established in and assigned to the States. [*Id.*, 5.]

* * * * *

> The committee majority is fully aware that in proposing legislation applying only to submerged lands inside State boundaries, there remains a large and important area requiring congressional action, namely, the Continental Shelf seaward of State boundaries. Senate Joint Resolution 13, as amended, deals with this vast area only to the extent that it gives statutory confirmation to the jurisdiction and control of the United States over the resources of the seabed and subsoil of the Continental Shelf which was asserted in 1945 by the Presidential proclamation. It does not attempt to provide for the administration and development of the area and the mechanics of control. [*Id.*, 9.]
>
> • • • • • •
>
> Section 9—Continental Shelf
>
> This section provides that nothing in this act shall affect the rights of the United States to the resources of the Continental Shelf outside State boundaries, which are declared to appertain to the United States and confirmed to be under its jurisdiction and control. [*Id.*, 13.]

In the congressional debates on the Submerged Lands Act, it was repeatedly recognized that the rights which were to be given to the States by the Act did not extend beyond State boundaries. The House version of H.R. 4198, 83d Cong., 1st Sess., was substantially like the Act as finally passed, except that it included a Title III which established procedures for federal administration of the area seaward of State boundaries. Ultimately, the latter subject was left to be dealt with instead by the Outer Continental Shelf Lands Act, 67

Stat. 462, 43 U.S.C., Supp. V, 1331-1343. In the course of the House debates on H.R. 4198, Representative Willis of Louisiana said (99 Cong. Rec. 2504):

> Thus, it has been estimated that nine-tenths of the areas covered by this bill will go to the United States, while only one-tenth will go to all of the coastal States. Specifically, the experts who testified before our committee have estimated that 26,000 square miles will go to all of the coastal States, while 237,000 square miles are located in the Continental Shelf beyond historic State boundaries and will go to the United States Government.

Representative Wilson of Texas agreed (*id.* 2510);

> As was stated by the gentleman from Louisiana [Mr. Willis], this bill deals with the inner Continental Shelf which is out to the historical boundaries of the several States * * *.

See also 99 Cong. Rec. 2502, 2525, 2568, 2576, 2578.

In the Senate, where the bill was debated at much greater length,[7] the same point was repeatedly made by Senator Cordon of Oregon, who was in charge of the bill, by Senator Holland of Florida, author of the Senate version, by Senator Daniel of Texas, and by others. The following passages are typical, and show the absolutely universal intent that the Act should grant to the States no rights whatever beyond their boundaries:

> Mr. CORDON. * * *

[7] In the Senate debates it was designated S. J. Res. 13. See fn. 4, *supra*, p. 36.

The waters involved in the joint resolution, beneath which are lands affected by the joint resolution, are the waters of the seas from low-water mark to the boundaries of the several States. [99 Cong. Rec. 2630.]

* * * * *

Mr. CORDON. The resolution does not create any difficulty, nor does it do away with any difficulty as to the location of a State's sea boundary. It does confirm in the United States the jurisdiction and control of the natural resources in the subsoil and seabed of the Continental Shelf outside of State boundaries, as such boundaries are defined in the joint resolution. [99 Cong. Rec. 2694-2695.]

* * * * *

Mr. HOLLAND. I am saying that the joint resolution, if passed, would completely confirm in the Federal Government all jurisdiction and control of every sort outside the State boundaries of not only Louisiana but also every other coastal State. [99 Cong. Rec. 2755.]

* * * * *

Mr. DANIEL. * * *

I shall not yield further, Mr. President, for any question on lands beyond historic boundaries, because such lands were eliminated from the resolution specifically for the purpose of confining it to lands within historic boundaries. The resolution confirms the jurisdiction and control of the United States Government over the resources outside the

historic boundaries of the coastal States. * * * [99 Cong. Rec. 2832.]

* * * * *

Mr. LONG. Does not the Senator understand that the pending measure does not dispose of the Continental Shelf, that it proposes only to restore to the States land within their historic boundaries, which comprises only about 10 percent, or less than 10 percent, of the land of the Continental Shelf?

Mr. KEFAUVER. Yes. I appreciate the fact that the measure only disposes of land within 3 miles of the low-water mark, or out to the so-called historic boundaries to which reference has been made. * * * [99 Cong. Rec. 3292.]

For many more statements to the same effect, see Appendix D, *infra*, pp. 374-388, and 99 Cong. Rec. 2616, 2695-2696, 2699, 2746, 2754, 2755, 2757, 2773, 2831, 2862, 2880, 2975, 2976, 3050, 4096, 4098, 4107-4108, 4111, 4112, 4175, 4358, 4897.

It is thus perfectly clear from both the terms and the history of the Submerged Lands Act that it granted to the States no rights beyond their actual boundaries—as Senator Holland said, "their boundaries of jurisdiction, of criminal law and of various other kinds of law, boundaries which fix the venues of cases which arise" (Senate Interior Committee Hearings on S.J. Res. 13, 83d Cong., 1st Sess., 48; *supra*, p. 87). There can be no doubt of the power of Congress to limit the scope of its grant in this way. The Submerged Lands Act was an exercise of the power of Congress to dispose of property of the United States, *Alabama* v.

Texas, 347 U. S. 272, and "it lies in the discretion of Congress, acting in the public interest, to determine of how much of the property it shall dispose." *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 336.

2. THE SUBMERGED LANDS ACT DID NOT GRANT RIGHTS MEASURED BY ANY BOUNDARY WHICH EXISTED ONLY PRIOR TO STATEHOOD

All of the defendant States have alleged that their boundaries extended more than three miles seaward prior to statehood.[8] It is not clear whether all of them rely on this as a separate basis for claiming rights under the Submerged Lands Act, but Louisiana and Florida at least seem to do so. The terms of the Submerged Lands Act do not justify reliance on boundaries existing prior to statehood. Section 2(a) of the Act, 43 U.S.C., Supp. V, 1301(a), defines "lands beneath navigable waters" as extending seaward to the three-mile limit,

> and to the boundary line of each sueh State where in any case such boundary as it existed *at the time* such State became a member of the Union, or as heretofore approved by Congress, exter ds seaward (or into the Gulf of Mexico) beyond three geographical miles * * * [emphasis added].

Section 2(b), 43 U.S.C., Supp. V, 1301(b), defines "boundaries" as including

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[8] Answer of the State of Louisiana to the Amended Complaint, Par. XI (A), p. 8; Answer of Defendant the State of Texas to Second Cause of Action, Par. IX (A), p. 3, Par. X, p. 4; Separate Answer of the State of Mississippi to Amended Complaint, Par. IV, p. 4; Answer and Cross-bill of State of Alabama to Amended Complaint, Par. III, p. 2; Defenses [of Florida] to Amended Complaint, Third Defense, pp. 4-5.

> the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed *at the time* such State became a member of the Union * * * [emphasis added].

Section 3(a), 43 U.S.C., Supp. V, 1311(a), grants to the States the "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States * * *." These are the operative provisions of the Act, and they make no reference to boundaries prior to statehood. "At the time" does not, in ordinary understanding, mean "prior to the time", and we find nothing in the Act or its history to suggest that it has such meaning here.

An implication contrary to the States' assertion results from the terms of Section 4, 43 U.S.C., Supp. V, 1312, which refers disjunctively to boundaries "prior to or at the time" a State became a member of the Union. That usage strongly suggests that Congress differentiated between the two expressions, giving to boundaries "at the time" of admission to Statehood, in Section 2(b), a more limited meaning than boundaries "prior to or at the time" of admission, in Section 4.

Section 2(b) is of course the definition of boundaries, for purposes of the grant made by the Submerged Lands Act, controlling the extent of the States' rights under the Act. The broader language of Section 4 was used for a different purpose and does not enlarge the grant. Section 4 (Appendix A, *infra*, p. 337) approves certain types of State boundary claims, and then concludes:

> Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

That language has no operative effect in the present case. It is a mere explanation that certain boundary claims, not approved by Section 4, are not thereby disapproved. They are to remain wholly unaffected by the section, neither approved nor questioned. This saving clause necessarily refers to boundaries in their general, jurisdictional aspect, rather than to the boundaries adopted as limits of the submerged lands grant, for in several respects it goes beyond the restrictions that Section 2(b) puts on boundaries adopted as limits of the grant. Thus, the claims left unaffected by Section 4 are not limited to three miles in the Atlantic and Pacific or three leagues in the Gulf, as are the boundaries adopted by Section 2(b). Section 4 preserves to a State its *claim* to any boundary "provided by its constitution or laws", without regard to the national or international validity of the provision; whereas Section 2(b) limits the *grant* to boundaries "as they existed", *i.e.*, to the extent that the boundary claims were legally effective. Similarly, Section 4 preserves claims to boundaries as they were "prior to or at the time" of statehood, whereas Section 2(b) limits the grant to boundaries existing "at the time" the State became a member of the Union. It is evident that Section 4, put-

ting to one side as neither approved nor disapproved very broad categories of boundary claims, does not enlarge the restrictions which Section 2(b) imposes on the boundaries adopted as delimiting the submerged lands *grant*.

Presenting the measure to the Senate, Senator Cordon, in the following colloquy with Senator Douglas, brought out that boundaries prior to statehood would not govern the granting provisions of the Act (99 Cong. Rec. 2699):

> Mr. DOUGLAS. I should like to ask the interpretation of these alternatives:
>
> > Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond 3 geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union.
>
> Is it the understanding of the Senator from Oregon that either one of these conditions—prior to, or at the time of entry into the Union—governs?
>
> Mr. CORDON. Not governs; either one of them comes within the provisions of the sentence.
>
> Mr. DOUGLAS. So that if a State, at some time prior to entering the Union, had in its constitution a provision for 3 leagues, and, at the time it came in, had only 1 league, then the State could properly claim the 3-league boundary?
>
> Mr. CORDON. That conclusion, of course, does not follow at all. This joint resolution does not

prejudice the matter, nor does it repeal an ordinary law that would determine it.

Thus, even if a State had had a boundary beyond the three-mile limit prior to statehood, the Submerged Lands Act did not adopt such a boundary as a measure of the submerged lands granted to the State. It merely provided that any claim a State might have to such a boundary was not to be deemed prejudiced by the fact that the Act did not ratify or adopt it.

3. THE SUBMERGED LANDS ACT NEITHER CHANGED NOR DECLARED THE LOCATION OF STATE BOUNDARIES

From Sections 2(a), 2(b), 3(a), 3(b) and 4 of the Submerged Lands Act, 43 U.S.C., Supp. V, 1301(a), 1301(b), 1311(a), 1311(b), and 1312 (*supra*, pp. 31-34), it is apparent that the Act did not change the location of any State boundaries. The submerged lands granted to the States, as defined by Section 2(b), are those lying within their boundaries as they existed when the States entered the Union, or as since approved by Congress, not extending, however, more than three miles into the Atlantic or Pacific oceans nor more than three leagues into the Gulf of Mexico. And the Act does not express any opinion as to the location of these boundaries. Boundaries claimed to lie more than three miles from the coast are not among those "approved and confirmed" by Section 4, but on the other hand that Section provides that it is not to be construed as "questioning or in any manner prejudicing" such boundaries. *Supra*, pp. 48-51. The Court, then, must look beyond the face of the Act to discover the scope of the grant made by it.

This evident meaning of the Submerged Lands Act is fully supported by its legislative history. During the

congressional debates, the three-league claims of Texas, Florida and Louisiana were frequently discussed and arguments for and against their validity were made. See, for example, statements in support of Texas' claim by Senator Daniel of Texas (99 Cong. Rec. 4171-4176) and Representative Fisher of Texas (99 Cong. Rec. 2565) and statements against it by Senator Anderson of New Mexico (99 Cong. Rec. 3037) and Representative McCarthy of Minnesota (99 Cong. Rec. 2569). But throughout the debates in the Senate, where the Act in its final form originated and was chiefly debated, it was repeatedly pointed out that the measure did not in any way approve or disapprove any claim beyond three miles, but rather left such claims wholly at large and subject to future determination to the same extent as if the Act had not been passed. Those who asserted the correctness of the three-league claims believed, of course, that the Act would give those States three leagues in the Gulf; but they recognized that that result would not follow from the mere terms of the Act, but would depend on the ability of those States to prove the validity of their prior claims. As Senator Daniel of Texas put it (99 Cong. Rec. 4175):

> Of course Texas boundary did exist at 3 leagues at the time of annexation and the Texas and Florida 3-league boundaries were heretofore approved by Congress, but that is history. It was not written by this bill and cannot be erased by this bill. The purpose of this bill is to write the law of State ownership for the future as being applicable to all navigable waters within boundaries as they existed heretofore, as they existed at the time the States entered the Union, or at the time when those

boundaries were heretofore approved by the Congress of the United States. * * *

The same position was taken by Senator Long of Louisiana and by Senator Holland of Florida, the author of the bill, speaking with respect to amendments introduced by Senator Holland (99 Cong. Rec. 4114, 4116) which limited the extent of the grant to a distance of three miles in the Atlantic and Pacific and three leagues in the Gulf of Mexico, and deleted reference to boundaries beyond three miles approved by Congress in the future:

Mr. LONG. With regard to Texas and Florida, these amendments do not propose to state that those States have a boundary of 3 leagues. They merely give them the right to establish that their boundary is 3 leagues.

Mr. HOLLAND. These amendments would not change the situation which has always existed. The States of Texas and Florida would simply be left where they were placed—the State of Texas by the action of Congress and its own action in 1845 and prior thereto, and the State of Florida by action of Congress in 1868 and its own prior action. We are simply left without prejudice in any way. The Senators from Florida and the Senators from Texas have made no attempt to have the boundaries of those States confirmed or reasserted, and, of course, we will not do so in this legislation. They stand for themselves as they existed at the time of admission or as heretofore approved by the Congress. [99 Cong. Rec. 4116.]

This point, that the Act neither endorsed nor prejudiced the claims of Texas and the other Gulf States, but left them free to make what proof they could as to their boundary locations, was particularly emphasized by Senator Cordon, acting chairman of the Senate Committee on Interior and Insular Affairs, who explained the bill to the Senate when it was reported out by that committee; and many others made statements to the same effect. The following excerpts from the debates are typical:[9]

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[9] Louisiana's objection (Reply of the State of Louisiana to Brief of the United States on Motion for Judgment [on original complaint], p. 20) to consideration of the statements by Senators Cordon, Holland, Long, Kuchel, and Daniel is not well taken. Senator Holland was the author of S. J. Res. 13, the text of which became the Submerged Lands Act; Senator Cordon was in charge of it in the Senate; and Senators Long, Kuchel and Daniel were also members of the Senate Interior Committee which reported the bill. Senators Holland, Long, Kuchel and Daniel represented respectively Florida, Louisiana, California and Texas, the four States most concerned over boundary problems and expecting to receive the greatest mineral values under the Act. While it is true that views of individual members of Congress are of little help in determining the meaning of an act, this Court has recognized the propriety of considering "informed congressional discussion," (*United States* v. *C. I. O.*; 335 U.S. 106, 113), and "the general trend of debate in both houses" (*Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 435). Particularly, it has considered statements by the sponsor of legislation (*Richbourg Motor Co.* v. *United States*, 281 U.S. 528, 536), by the committee member in charge of it (*United States* v. *Great Northern Ry.*, 287 U.S. 144, 154-155; *Duplex Co.* v. *Deering*, 254 U.S. 443, 475-477), and by other members of the committee reporting the measure, not contradicted by other members of the committee (*United States* v. *Mine Workers*, 330 U.S. 258, 277-280), even preferring such a statement, in some circumstances, to the committee report (*Chicago etc. R. Co.* v. *Acme Freight*, 336 U.S. 465, 474-476). We submit that these authorities amply justify consideration of the statements referred to by the Government, particularly in view of the fact that four of them in the nature of disclaimers by Senators from the States most benefited, must have been, and were certainly intended to be, highly persuasive in se-

Mr. CORDON. * * * The States of the United States have legal boundaries. It is not a part of the power or the duty of Congress to make determination with reference to those boundaries, or where those boundaries should lie. It is a matter for the courts to determine, or for the United States, through Congress and the legislative organizations of the several States, to reach an agreement upon. The pending bill does not seek to invade either province. It leaves both exactly where it finds them. Whenever a question arises as to a boundary, it will be determined exactly as any other question in law is determined, and the boundary will be established.

The pending measure does not seek to prejudge that issue, or to determine it. It is not within the province of Congress to change the present boundaries of Texas without the consent of the State of Texas. [99 Cong. Rec. 2620.]

* * * * *

Mr. MURRAY.[10] * * * In the light of the very helpful observations made by the distinguished Senator from Oregon I believe we can now all agree that no clear limit is established by Senate Joint Resolution 13 on the extent of the oil and gas resources which are given to the State.

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curing passage of the measure. Cf. *Duplex Co.* v. *Deering*, 254 U.S. 443, 477. All of them, moreover, corroborate the meaning apparent on the face of the act.

[10] Senator Murray presented the minority report on S. J. Res. 13, S. Rept. No. 133, Part 2, 83d Congress, 1st Sess.

* * * the legislation before us does not attempt to delimit or fix these State boundaries. [99 Cong. Rec. 2845.]

* * * * *

Mr. KUCHEL. * * * One other question which has arisen in these debates is the California boundary statute, adopted by my State in 1949. * * *

* * * * *

The point here, however, is that the pending joint resolution has no effect on the 1949 act. It neither validates nor invalidates it. The effect of this act of the State of California awaits judicial determination. California, like every other State, will have an equal opportunity to establish the location of its own coastline and historic boundary. This is the basic, underlying equity of the resolution. [99 Cong. Rec. 2985.]

* * * * *

Mr. KEFAUVER. I have a very high regard for the State of Louisiana and the very distinguished Senators from that State. But is there anything in the last part of the amendment of the Senator from Florida which might be interpreted as granting the State of Louisiana a boundary of 3 leagues out from its shore, rather than the 3 miles which I understand it now claims?

Mr. HOLLAND. I will say categorically to the Senator that there is not.

* * * * *

Mr. LONG. I am certain the Senator is aware, is he not, that there are some persons in Louisiana who contend that the language is the enabling act

which brought Louisiana into the Union, referring to the boundary as including all islands within 3 leagues, might be susceptible of the construction that Louisiana had the same rights as does Florida, for example, with regard to the 3-league limit? The Senator is not, by his amendment, proposing to prevent Louisiana from seeking adjudication in the courts as to what the actual boundary is, is he?

Mr. HOLLAND. Indeed not. The Senator from Florida would not, if he could, do anything whatsoever to limit or adversely affect the State of Louisiana in that regard. Any rights the State of Louisiana has would be left undisturbed by these amendments.

* * * * *

Mr. LONG. With regard to Texas and Florida, these amendments do not propose to state that those States have a boundary of 3 leagues. They merely give them the right to establish that their boundary is 3 leagues.

Mr. HOLLAND. These amendments would not change the situation which has always existed. The States of Texas and Florida would simply be left where they were placed—the State of Texas by the action of Congress and its own action in 1845 and prior thereto, and the State of Florida by action of Congress in 1868 and its own prior action. We are simply left without prejudice in any way. The Senators from Florida and the Senators from Texas have made no attempt to have the boundaries of those States confirmed or reasserted, and, of course, we will not do so in this

> legislation. They stand for themselves as they existed at the time of admission or as heretofore approved by the Congress. [99 Cong. Rec. 4116.]

Other pertinent excerpts from the Senate debate on the Submerged Lands Act are set forth in Appendix E, *infra*, pp. 389-402).

In the light of the foregoing, there is no room for doubt that by the Submerged Lands Act Congress did not purport to grant to the States the submerged lands to any particular distance from the shore of the Gulf of Mexico, but rather granted such lands within the actual State boundaries, wherever they might be located, as they existed for purposes of ordinary political jurisdiction when the States entered the Union or as afterward approved by Congress before May 22, 1953[11] (but in any event not over three miles in the Atlantic and Pacific or three leagues in the Gulf of Mexico). As the Senate debate unequivocally recognized, a mere *claim* to three leagues would not be enough; the decisive factor is the actual legal boundary and not the State's claim or demand. Accordingly, to determine the extent of the grant made to a State, it is necessary to ascertain whether its actual political boundary was more than three miles from the coast in the Gulf of Mexico when it entered the Union, or has since been approved by Congress at such greater distance before May 22, 1953.

In Subsection C, *infra*, pp. 59-151, we discuss the national policy and international law which, we believe, limited all States to boundaries extending not more

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[11] Section 2(b), 43 U.S.C., Supp. V, 1301(b), defines "boundaries" as including those existing when a State entered the Union or "heretofore" approved by Congress. The Submerged Lands Act was approved May 22, 1953. 67 Stat. 33.

than three miles from the coast. In Points II through VI, we discuss separately the particular questions relating to the several defendants. It is our position that the national policy was universal and conclusive, and that no defendant has shown or could show any departure from it.

C. AT ALL TIMES RELEVANT TO THE SUBMERGED LANDS ACT, THE BOUNDARY OF THE UNITED STATES HAS BEEN THREE MILES FROM THE COAST, AND HAS FIXED THE MAXIMUM LIMIT OF STATE BOUNDARIES

1. THE UNITED STATES HAS DISCLAIMED SOVEREIGNTY OVER A MARGINAL BELT MORE THAN THREE MILES WIDE

(a). *Both the Executive Branch and Congress have adopted the three-mile marginal belt*

The concept of the marginal belt of territorial water, subject to the sovereignty of a coastal nation, is an encroachment upon the general principle of freedom of the seas. Being firmly committed to freedom of the seas as a major premise of national policy (*United States v. California*, 332 U.S. 19, 34), the United States has always insisted that the width of the marginal belt of territorial waters which it would claim for itself or recognize for other nations must be held to a minimum. By the time when Louisiana, first of the defendant States to achieve statehood, was admitted to the Union in 1812, the national policy was already well settled to claim sovereignty over no more than three miles of marginal sea and to recognize no greater claims by other nations.[12] The policy had its

[12] As we proceed to show, the United States has never departed from its position that three miles is the maximum width of marginal sea which has heretofore been permitted by international law or claimed or recognized by the United States, although some nations

beginning in the administration of George Washington, when Thomas Jefferson, then Secretary of State, on November 8, 1793, wrote to George Hammond, the British minister (H. Exec. Doc. No. 324, 42d Cong., 2d Sess., 553), and to Edmond Genet, the French minister (*American State Papers*, 1 Foreign Relations 183):

> The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected navigation as any nation whatever. Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority, to consider those heretofore given them as restrained for the present to the distance of one sea-league or three geographical miles from the seashores.

Two days later, Jefferson sent to the United States Attorneys a circular to the same effect. It said, in part:

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make and have made greater claims. At the recent United Nations Conference on the Law of the Sea, held at Geneva, February 24–April 28, 1958, the United States, while maintaining its position that three miles is the maximum now permitted by international law, made a compromise proposal that six-mile limits be agreed on for the future. That proposal was made solely for the purpose of securing international agreement on a uniform rule to apply for the future. It has not been adopted; unless and until it is adopted, the United States intends to adhere to the three-mile rule. In any event, the United States will insist that three miles is the greatest distance permissible under international law in the absence of a different measure arrived at by international agreement. See *infra*, pp. 96-100. Any change on the international law on the subject, brought about by international agreement after May 22, 1953, is of course immaterial so far as the present case is concerned since, under the Submerged Lands Act, a change in the boundary after the passage of the Act would be ineffective to increase the grant made therein. See *infra*, pp. 100-101.

The war at present prevailing among the European powers producing sometimes captures of vessels in the neighbourhood of our seacoast, and the law of nations admitting as a common convenience that every nation inhabiting the sea coast may extend its jurisdiction and protection some distance into the sea, the President has been frequently appealed to by the subjects of the belligerent powers for the benefit of that protection. To what distance from the seacoast this may be extended is not precisely ascertained either by the practice or consent of nations or the opinions of the Jurists who have written on the subject. The greatest distance to which any respectable assent seems to have been given is the extent of the human sight, estimated at something more than 20 miles. The least claimed by any nation is the utmost range of Cannon shot, usually stated at one sea-league, or 3 sea miles, which is a very small fraction less than 3½ Statute or american miles. Several intermediate distances have been insisted on under different circumstances, and that particularly of 3 sea-leagues has the support of some authorities which are recent. However as the Nations which practice navigation on our coasts, are interested in this question, it is thought prudent not to assume the whole distance which we may reasonably claim, until some opportunity shall occur of entering into friendly explanations and arrangements with them on the subject; but as in the mean time it is necessary to exercise the right to some distance, the President has thought it best, *so far as shall concern the exercise of the Executive powers,* to take the distance of a sea-league, which being settled by treaty between some

> of the belligerent powers, and as little as any of them claim on their own coasts, can admit of no reasonable opposition on their part. *The executive officers* are therefore instructed to consider a margin of one sea-league on our coast as that within which all hostilities are interdicted for the present, until it shall be otherwise signified to them.[13]

The policy thus tentatively announced has never been modified, and soon became the settled view of this nation on the subject. Within less than a year, Congress adopted it as the basis for jurisdiction of the district courts in Section 6 of the Neutrality Act of June 5, 1794, 1 Stat. 381, 384, which provided:

> That the district courts shall take cognizance of complaints by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof.

That provision has been maintained continuously in effect down to the present day, except for the period 1873-1875, when it was inadvertently omitted from the first edition of the Revised Statutes.[14]

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[13] Ms. in National Archives, Record Group 59; emphasis in original.

[14] The Act of June 5, 1794, *supra*, originally limited to two years' duration, was extended two years more by the Act of March 2, 1797, 1 Stat. 497, and then was continued indefinitely by the Act of April 24, 1800, 2 Stat. 54. It was replaced by the Neutrality Act of April 20, 1818, 3 Stat. 447, Section 7 of which contained the language quoted above from Section 6 of the former Act. 3 Stat. 449. The Act was among those extended to the Territory of Florida by Section 9 of the Organic Act of that Territory, March 30, 1822, 3 Stat. 654, 657. Originally omitted from the Revised Statutes of 1873, the language quoted above was inserted at the beginning of

As stated in Jefferson's circular to the United States Attorneys, *supra*, the range of a cannon shot was then considered the equivalent of three miles,[15] and on November 19, 1794, the United States entered into a treaty with Great Britain recognizing the range of cannon shot as marking the territorial limits of the two countries in the sea (Art. XXV, 8 Stat. 116, 128):

> Neither of the said parties shall permit the ships or goods belonging to the subjects or citizens of the other, to be taken within cannonshot of the coast, nor in any of the bays, ports, or rivers of their territories, by ships of war, or others having commission from any prince, republic, or state whatever. But in case it should so happen, the party whose *territorial rights* shall thus have been violated, shall use his utmost endeavours to obtain from the offending party, full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war or merchant vessels. [Emphasis added.]

On September 2, 1796, Timothy Pickering, then Secretary of State under President Washington, wrote to

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R.S. 5287 by the corrective Act of February 18, 1875, 18 Stat. (Pt. 3) 316, 320. The Criminal Code of March 4, 1909, repealing that and other parts of the Revised Statutes (Sec. 341, 35 Stat. 1153), included the language quoted above, at the beginning of Section 14, 35 Stat. 1090. It now appears in 22 U.S.C. 461.

[15] See also Jefferson's letter of November 8, 1793, to Mr. Hammond, the British minister: "* * * the smallest distance, I believe, claimed by any nation whatever, *is the utmost range of a cannon ball*, usually stated at one sea league." 1 Moore, *Digest of International Law* (1906) 702; emphasis in original. See also the letter of January 23, 1849, from Secretary of State Buchanan to Mr. Jordan, *infra*, p. 66.

the Lieutenant Governor of Virginia (1 Moore, *Digest of International Law* (1906) 704):

> Our jurisdiction * * * has been fixed (at least for the purpose of regulating the conduct of the government in regard to any events arising out of the present European war) to extend three geographical miles (or nearly three and a half English miles) from our shores * * *.

Not long after Jefferson became president, the United States protested against a claim by Spain to more than three miles of territorial water around Cuba. As described by Secretary of State Bayard, writing on May 28, 1886, to Secretary of the Treasury Manning (1 Moore, *Digest of International Law* (1906) 718, 720):

> When we were involved, in the earlier part of Mr. Jefferson's Administration, in difficulties with Spain, we then told Spain that we conceded to her, so far as concerned Cuba, the same limit of territorial waters as we claimed for ourselves, granting nothing more * * *.[16]

These actions, all taken before 1812, show that the policy of the United States to claim and recognize territorial waters of three miles and no more was well established before Louisiana became a State. Moreover, twice within six years after Louisiana became a State, the Federal Government reiterated its foreign policy in this regard. Article 11 of the Treaty with Algiers, of June 30 and July 6, 1815, provided (8 Stat. 224, 225):

> If a vessel of either of the contracting parties

[16] See *infra*, pp. 75-78.

> shall be attacked by an enemy within cannonshot of the forts of the other, she shall be protected as much as is possible.

And, the Treaty of October 20, 1818, with Great Britain reverted to the more specific terms of three miles (8 Stat. 248, 249):

> And the United States hereby renounce, forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbours, of his Britannic Majesty's dominions in America, not included within the abovementioned limits * * *.

By a long succession of subsequent actions, from 1848 to the present era, this policy has been continuously maintained. When Britain protested because she feared that by the Treaty of Guadalupe Hidalgo, February 2, 1848, 9 Stat. 922, the United States and Mexico intended to claim three-league limits in the Gulf of Mexico, Secretary of State Buchanan disclaimed such intention, as follows, August 19, 1848 (1 Moore, *Digest of International Law* (1906) 730):

> I have had the honor to receive your note of the 30th April last objecting, on behalf of the British Government, to that clause in the 5th article of the late treaty between Mexico and the United States by which it is declared that "the boundary line between the two republics shall commence in the Gulf of Mexico 3 leagues from land," instead of one league from land, which you observe "is acknowledged by international law and practice as

> the extent of territorial jurisdiction over the sea that washes the coasts of states."
>
> In answer I have to state, that the stipulation in the treaty can only affect the rights of Mexico and the United States. If for their mutual convenience it has been deemed proper to enter into such an arrangement, third parties can have no just cause of complaint. The Government of the United States never intended by this stipulation to question the rights which Great Britain or any other power may possess under the law of nations.[17]

On January 23, 1849, James Buchanan, Secretary of State under President Polk, wrote to a Mr. Jordan (*ibid.*, 705):

> The exclusive jurisdiction of a nation extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of sea inclosed by headlands; and, also, to the distance of a marine league, or as far as a cannon shot will reach from the shore along its coasts.

On March 6, 1855, the Spanish frigate Ferrolona seized and detained the United States mail steamer El Dorado at some distance from Cuba. William L. Marcy, Secretary of State, on July 7, 1855, wrote of this to Augustus C. Dodge, American Ambassador to Spain, as follows (11 Manning, *Diplomatic Correspond-*

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[17] Britain made a similar protest to Mexico, to which Mexico made a similar reply, set out in Appendix F, *infra*, pp. 403-404. The British protest to Mexico is quoted in a letter of May 6, 1936, from Eduardo Hay, Mexican Foreign Minister, to Josephus Daniels, American Ambassador, 99 Cong. Rec. 3623.

ence of the United States, Inter-American Affairs, 1831-1860 (1939) 214, 217):

> The United States will never concede that in the thoroughfares of commerce between Cape St. Antonio and the Yucatan shore, or between the Keys of Florida and the Cuban coast the territorial waters of Spain extend eight miles from land or any distance beyond cannon shot or a marine league.—Considering the vast amount of property transported over these thoroughfares it is of the greatest importance to the interests of commerce that the extent of the Spanish claim to jurisdiction in these two straits—for such they may be called—should be accurately understood.
>
> * * * * *
>
> * * * That case is to be decided with reference to the existing rule of international law on the subject. That rule by very general consent establishes the distance of a marine league from land as the exterior limit of the jurisdiction of a country over the waters along its coasts, with exceptions as to bays, harbors, shoals &c. None of the exceptions can by any reasonable construction be so extended as to cover the place where the El Dorado was at the time she was detained and searched by the Ferrolona.

Those instructions were quoted verbatim by Ambassador Dodge in a letter of August 13, 1855, to Juan de Zavala, the Spanish Foreign Minister. 11 Manning, *Diplomatic Correspondence of the United States, Inter-American Affairs, 1831-1860* (1939) 878-879.

William Seward, Secretary of State under President Lincoln,[18] wrote on August 4, 1862, to Gideon Welles, Secretary of the Navy (1 Moore, *Digest of International Law* (1906), 705):

> This Government adheres to, recognizes, and insists upon the principle that the maritime jurisdiction of any nation covers a full marine league from its coast, and that acts of hostility or of authority within a marine league of any foreign country by naval officers of the United States are strictly prohibited * * *.

When Spain re-asserted its claim to sovereignty over a six-mile belt around Cuba, Secretary of State Seward wrote at length to Gabriel Tassara, the Spanish minister, explaining why the United States could not recognize that claim. He said, in part,

> * * * this exclusive sovereignty of a nation, thus abridging the universal liberty of the seas, extends

[18] In the Reply of the State of Louisiana to Brief of the United States on Motion for Judgment, p. 29, and in the Motion for Reconsideration of Order Denying Right of Intervention, and Supporting Brief in Answer to U. S. Brief for Judgment, filed by L. H. Perez and others, pp. 6-7, it is argued that Secretary Seward's support of the three-mile rule is discredited by the fact that he also negotiated the Treaty of March 18/30, 1867, by which the United States bought Alaska from Russia, which treaty fixed a boundary ten leagues from the coast. The fact is that the boundary ten leagues from the coast, provided for by that treaty, was ten leagues *inland*, separating the coastal strip or "panhandle" from British Columbia. 15 Stat. 539, 540. That is the boundary that was arbitrated under the Convention of January 24, 1903, 32 Stat. 1961, and determined to be ten leagues inland from the heads of the inlets, as claimed by the United States, rather than from the mouths of the inlets as claimed by Great Britain. *Proceedings of the Alaskan Boundary Tribunal* (S. Doc. No. 162, 58th Cong., 2d Sess.). Plainly that provision has no tendency whatever to discredit Secretary Seward's adherence to the rule of a three-mile marginal belt.

no farther than the power of the nation to maintain it by force, stationed on the coast, extends. * * *

But it must always be a matter of uncertainty and dispute at what point the force of arms exerted on the coast can actually reach. * * * A more practical limit of national jurisdiction upon the seas was indispensably necessary, and this was found, as the undersigned thinks, in fixing the limit at three miles from the coast. This limit was early proposed by the publicists of all maritime nations. While it is not insisted that all nations have accepted or acquiesced and bound themselves to abide by this rule when applied to themselves, yet three points involved in the subject are insisted upon by the United States: First, that this limit has been generally recognized by nations; second, that no other general rule has been accepted; and third, that if any state has succeeded in fixing for itself a larger limit, this has been done by the exercise of maritime power, and constitutes an exception to the general understanding which fixes the range of a cannon-shot (when it is made the test of jurisdiction) at three miles. * * *

Impressed by these general views, the United States are not prepared to admit that Spain, without a formal concurrence of other nations, can exercise exclusive sovereignty upon the open sea beyond a line of three miles from the coast * * *.

Spain presented substantially the same claim to this Government in the case of the *El Dorado* in 1856, and Mr. William L. Marcy, then Secretary of State, by direction of the President, an-

> nounced that the United States could not concede the extension of Spanish sovereignty beyond three miles in the seas which surround the island of Cuba. [Letter of December 16, 1862. 1 Moore, *Digest of International Law* (1906) 706, 707-708.]

On September 3, 1863, Secretary Seward wrote to Secretary of the Navy Welles (*ibid.*, 730):

> The stipulation in the treaty of Guadalupe-Hidalgo by which the boundary between the United States was begun in the Gulf three leagues from land is still in force. It was intended, however, to regulate within those limits the rights and duties of the parties to the instrument only. It could not affect the rights of any other power under the law of nations.

On March 1, 1864, Lord Lyons, the British Ambassador, protested the seizure by the United States of certain British merchant ships at the mouth of the Rio Grande.[19] *Foreign Relations of the United States*, 1864, Pt. II, 536. Replying on March 9, 1864, Secretary of State Seward transmitted a copy of a letter from Gideon Welles, Secretary of the Navy, dated March 5, 1864, stating the Government's position in part as follows (*Id.*, 547, 548):

> I do not understand our government to claim * * * the right to exercise exclusive jurisdiction to the extent of more than a marine league from our coast.
>
> With respect to the point last mentioned, any misapprehension which exists may have arisen

[19] In prize proceedings, the vessels were ordered restored. *The Dashing Wave*, 5 Wall. 170; *The Sir William Peel*, 5 Wall. 517.

partly from what may have been an inadvertence, analogous to a clerical error, in the treaty with Mexico, and partly to our municipal law, under which merchant vessels bound to the United States may be boarded by the revenue officers when within four leagues of our coast. Other nations have similar municipal laws, which are to be regarded merely as prescribing the conditions on which trade is permitted.

* * * * *

It is not improbable that the commanders of some of our cruisers in the gulf are not accurately informed of the extent of the national rights herein referred to, and the department will lose no time in placing the matter properly before them.

The whole coast of Texas, except such part as may be necessary for access to the port of Brownsville, is to be regarded as under blockade.

Before the battle between the *Kearsarge* and the *Alabama* off Cherbourg, France, on June 19, 1864, M. Drouyn de l'Huys, the French foreign minister, requested of Mr. Dayton, the American minister, that the battle be held at a substantially greater distance than three miles from the coast. Mr. Dayton replied that "no other rule than the three-mile rule was known or recognized as a principle of international law," but that we would attempt to honor the French request so far as could be done without prejudicing our tactical position. Letter of June 17, 1864, from Mr. Dayton to Secretary of State Seward; see 1 Moore, *Digest of International Law* (1906) 723. Mr. Dayton so instructed Captain Winslow of the *Kearsarge,* which

Secretary of State Seward subsequently approved, saying, "It will be proper for you, nevertheless, while informing M. Drouyn de l'Huys that I do so in a spirit of courtesy towards France, to go further, and inform him that the United States do not admit a right of France to interfere with their ships of war at any distance exceeding three miles." Letter of July 2, 1864. See 1 Moore, *Digest of International Law* (1906) 724.

In 1874 Lord Derby, the British foreign minister, inquired as to the attitude of the United States toward the Spanish claim of two leagues. *Foreign Relations of the United States,* 1875, Pt. I, 641-642. To that inquiry, Hamilton Fish, Secretary of State under President Grant, replied on January 22, 1875 (*Foreign Relations of the United States,* 1875, Pt. I, 649-650):

> In reply I have the honor to inform you that this Government has uniformly, under every administration which has had occasion to consider the subject, objected to the pretension of Spain adverted to, upon the same ground and in similar terms to those contained in the instruction of the Earl of Derby.
>
> We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a marine league from its coast.
>
> This opinion on our part has sometimes been said to be inconsistent with the facts that, by the laws of the United States, revenue-cutters are authorized to board vessels anywhere within four leagues of their coasts, and that by the treaty of Guadalupe Hidalgo, so called, between the United States and Mexico, of the second of February, 1848, the boundary line between the dominions of

the parties begins in the Gulf of Mexico, three leagues from land.

It is believed, however, that in carrying into effect the authority conferred by the Act of Congress referred to, no vessel is boarded, if boarded at all, except such a one as, upon being hailed, may have answered that she was bound to a port of the United States. At all events, although the act of Congress was passed in the infancy of this Government, there is no known instance of any complaint on the part of a foreign government of the trespass by a commander of a revenue-cutter upon the rights of its flag under the law of nations.

In respect to the provision in the treaty with Mexico, it may be remarked that it was probably suggested by the passage in the act of Congress referred to, and designed for the same purpose, that of preventing smuggling. By turning to the files of your legation, you will find that Mr. Bankhead, in a note to Mr. Buchanan on the 30th of April, 1848, objected on behalf of Her Majesty's government, to the provision in question. Mr. Buchanan, however, replied in a note of the 19th of August, in that year, that the stipulation could only affect the rights of Mexico and the United States, and was never intended to trench upon the rights of Great Britain, or of any other power under the law of nations.

In May, June, and July, 1880, four American vessels were stopped and visited by Spanish gunboats at distances of more than three miles from Cuba. Instructing Lucius Fairchild, American Ambassador to Spain, to protest, William M. Evarts, Secretary of

State under President Hayes, wrote on August 11, 1880 (*Foreign Relations of the United States,* 1880, pp. 922, 926):

> I desire, however, that the position heretofore more than once distinctly taken by this government, in its diplomatic correspondence with Spain, shall be understood by you and firmly adhered to in any intercourse you may have in the pending situation with the Spanish minister of foreign affairs. This government never has recognized and never will recognize any pretense or exercise of sovereignty on the part of Spain beyond the belt of a league from the Cuban coast over the commerce of this country in time of peace. This rule of the law of nations we consider too firmly established to be drawn into debate, and any dominion over the sea outside of this limit will be resisted with the same firmness as if such dominion were asserted in mid-ocean.

Writing again on the same matter on March 3, 1881, Secretary Evarts said (*Foreign Relations of the United States,* 1881, pp. 1051, 1052):

> This government must adhere to the three-mile rule as the jurisdictional limit, and the cases of visitation *without that line* seem not to be excused or excusable under that rule.

Referring to the right of whale fishing off Bahia Bay, on the coast of Brazil, John Davis, Assistant Secretary of State under President Arthur, wrote, "The general law and rule is understood by this Government to be that beyond the marine league or three-mile limit, all persons may freely catch whale or fish."

Letter to Mr. Osborn, February 14, 1884, 1 Moore, *Digest of International Law* (1906) 718.

When the question arose as to the extent of American territorial jurisdiction over the waters of the northwest coast, Thomas Bayard, Secretary of State in President Cleveland's first administration, wrote at length to Daniel Manning, Secretary of the Treasury, on May 28, 1886, reviewing the whole history of the United States' policy regarding territorial waters. He said, in part (1 Moore, *Digest of International Law* (1906) 718-721):

> In a letter by Mr. Jefferson, when Secretary of State on November 8, 1793, to the minister of Great Britain, and in a circular of November 10, 1793, to the United States district attorneys, the limit of one sea-league from shore was provisionally adopted by him as that of the territorial seas of the United States. The same position was taken by Mr. Pickering, Secretary of State, on September 2, 1796; by Mr. Madison, Secretary of State, Feby. 3, 1807; By Mr. Webster, Secretary of State, August 1, 1842; by Mr. Seward, Secretary of State, December 16, 1862; August 10, 1863, Sept. 16, 1864; and by Mr. Fish, Secretary of State, December 1, 1875.
>
> In a note from Mr. Fish to Sir Edward Thornton, dated Jan. 22, 1875, it is expressly stated in reply to inquiries from the British foreign office "that this Government has uniformly, under every administration, objected to the pretension of Spain" to a six-mile limit. Mr. Fish proceeds to show that the United States statute, giving the right to board vessels within four leagues of the coast, is applied only to vessels coming to United

States ports, and that the extension of the boundary line, between the United States and Mexico, to three leagues from land, by the treaty of Guadalupe Hidalgo, applies only to Mexico and the United States.

Mr. Evarts, writing to Mr. Fairchild, then our representative in Spain on March 3, 1881 (Foreign Relations, 1881) said: "This Government must adhere to the three-mile rule as the jurisdictional limit, and the cases of visitation *without that line* seem not to be excused or excusable under that rule."

* * * * *

We may therefore regard it as settled that, so far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign.

The position I here state, you must remember, was not taken by this Department speculatively. It was advanced in periods when the question of peace or war hung on the decision. When, during

the three earlier administrations, we were threatened on our coast by Great Britain and France, war being imminent with Great Britain, and for a time actually though not formally engaged in with France, we asserted this line as determining the extent of our territorial waters. When we were involved, in the earlier part of Mr. Jefferson's Administration, in difficulties with Spain, we then told Spain that we conceded to her, so far as concerned Cuba, the same limit of territorial waters as we claimed for ourselves, granting nothing more; and this limit was afterwards reasserted by Mr. Seward during the late civil war, when there was every inducement on our part not only to oblige Spain, but to extend, for our own use as a belligerent, territorial privilege. When, in 1807, after the outrage on the *Chesapeake* by the *Leopard*, Mr. Jefferson issued a proclamation excluding British men-of-war from our territorial waters, there was the same rigor in limiting these waters to three miles from shore. And during our various fishery negotiations with Great Britain we have insisted that beyond the three-mile line British territorial waters on the northeastern coast do not extend. Such was our position in 1783, in 1794, in 1815, in 1818. Such is our position now in our pending controversy with Great Britain on this important issue. * * * From the time when European fishermen first visited the great fisheries of the northeastern Atlantic, these fisheries, subject to the territorial jurisdiction above stated, have been held open to all nations * * *. These rights we insist on being conceded to our fishermen in the northeast, where the mainland is under the

British sceptre. We can not refuse them to others on our northwest coast, where the sceptre is held by the United States. We asserted them, as is seen by Mr. Fish's instruction, above quoted of December 1, 1875, against Russia, thus denying to her jurisdiction beyond three miles on her own marginal seas. We can not claim greater jurisdiction against other nations, of seas washing territories which we derived from Russia under the Alaska purchase.[20]

During the arbitration of the whaling and sealing claim of the United States against Russia, held at The Hague in 1902, Mr. Peirce, the delegate for the United States, made the following statement on July 4, 1902 (*Foreign Relations of the United States*, 1902, Appendix I, 440):

> In the first session the arbitrator asked me, "What is the extent of jurisdiction which the United States claim to-day in Bering Sea?" and I replied that the American Government now claims an extent of 3 miles. I wished that this reply might be sustained by the Secretary of State, Mr. John Hay. I am now in receipt of a dispatch, and in accordance with the authority which I have received from the Secretary of State of the United States, dated July 3, 1902, I repeat that the Gov-

[20] Louisiana argues that Secretary of State Bayard was here speaking only of a rule established for the east coast. Reply of the State of Louisiana to Brief of the United States on Motion for Judgment [on original complaint], p. 30. In fact, he was stating the rule established on the east coast, for the express purpose of showing that the United States could not establish a different rule on another coast. His theme was that our position was necessarily universal in its application.

ernment of the United States claims, neither in Bering Sea nor in its other bordering waters, an extent of jurisdiction greater than a marine league from its shores, but bases its claims to jurisdiction upon the following principle: The Government of the United States claims and admits the jurisdiction of any State over its territorial waters only to the extent of a marine league, unless a different rule is fixed by treaty between two States; even then the treaty States alone are affected by the agreement.

On October 6, 1906, Secretary of State Root wrote to the American Ambassador to Mexico regarding a Mexican law asserting the right to search vessels within 20 kilometers (about 10.8 nautical miles) from the coast. The Secretary enclosed an opinion by the Solicitor of the Department of State, dated October 2, 1906, which said, in part (39 Cong. Rec. 3621, 3622):

> International law limits the sovereignty of a country to 3 miles from low-water mark * * *.
>
> * * * * *
>
> While it is clearly settled that territorial jurisdiction does not extend beyond the 3-mile limit, still there is a tendency to permit the regulated exercise of the right of inspection beyond this limit. A distinction is taken between the general application of municipal laws beyond the limit and the extension of the revenue or customs laws for the purpose of facilitating importation. For example an unrepealed statute of the United States permits officers of revenue cutters "to board all vessels which arrive within 4 leagues of the

coast thereof, if bound for the United States, and search and examine the same, and every part thereof, and shall demand, receive, and certify the manifest required to be on board certain vessels, shall affix and put proper fastenings on the hatches and other communications with the hold of any vessel, and shall remain on board such vessel until they arrive at the port or place of their destination." (R. S. 2760.)

It cannot be claimed that the jurisdiction of the United States rightfully extends beyond the 3-mile limit, except to its citizens. It would seem, however, that where foreign vessels are bound to the United States, the visitation and examination of cargo as provided for in this article may be convenient. Convenience, therefore, to both parties—to the incoming vessel as well as to the customs officers—would seem to dictate the act and justify the policy. * * *

* * * * *

It would appear, therefore, in the light of authority that local jurisdiction without the consent of the party to be affected does not extend beyond the 3-mile limit * * *.

On June 16, 1909, Assistant Secretary of State Huntington Wilson wrote to Mr. F. M. Wilmot, Manager of the Carnegie Hero Fund Commission (1 Hackworth, *Digest of International Law* (1940) 634; 99 Cong. Rec. 3622):

I have to acknowledge the receipt of your letter of the 8th instant, wherein, for the information of your Commission in determining what distance

> from shore acts performed at sea may properly be considered as within the waters of the United States, you inquire as to the extent of the maritime jurisdiction of the United States.
>
> In reply you are advised that this Government has always adhered to the principle that its maritime jurisdiction extends for a distance of 1 marine league (or nearly 3½ English miles) from its coasts. This, of course, does not include any waters or bays which are so landlocked as to be, without question, only in the jurisdiction of the United States.

Regarding a Russian law of 1910 extending customs regulations to vessels within twelve marine miles of low-water mark, Philander Knox, Secretary of State under President Taft, instructed Mr. Rockhill, the American Ambassador to Russia, to state to the Russian minister for foreign affairs that,

> with reference to the general operation of the law over the marginal seas beyond the generally recognized three mile limit and particularly as affecting American commerce, the United States is constrained to reserve all rights of whatever nature. [Letter of January 21, 1911. 1 Hackworth, *Digest of International Law* (1940) 634-635.]

When an Italian royal decree of August 6, 1914, undertook to fix the limits of Italian territorial waters at six nautical miles, Robert Lansing, then Acting Secretary of State under President Wilson, wrote to the Italian Ambassador, in part as follows, November 28, 1914 (*Foreign Relations of the United States*, 1914, Supp., 665; 1 Hackworth, *Digest of International Law* (1940) 637-638):

> I am compelled to inform Your Excellency of my inability to accept the principle of the Royal Decree, in so far as it may undertake to extend the limits of the territorial waters beyond three nautical miles from the main shore line and to extend thereover the jurisdiction of the Italian Government.
>
> An examination into the question involved leads me to the conclusion that the territorial jurisdiction of a nation over the waters of the sea which wash its shore is now generally recognized by the principal nations to extend to the distance of one marine league or three nautical miles, that the Government of the United States appears to have uniformly supported this rule, and that the right of a nation to extend by domestic ordinance, its jurisdiction beyond this limit has not been acquiesced in by the Government of the United States.

On January 23, 1924, the United States entered into a treaty with Great Britain, permitting the United States to seize British vessels engaged in liquor smuggling within one hour's sailing distance of the shore. Article I of that treaty provided (43 Stat. 1761):

> The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coast-line outwards and measured from low-water mark constitute the proper limits of territorial waters.

The same provision is contained in similar treaties entered into with Germany on May 19, 1924 (43 Stat. 1815), with Panama on June 6, 1924 (43 Stat. 1875),

with The Netherlands on August 21, 1924 (44 Stat. 2013), with Cuba on March 4, 1926 (44 Stat. 2395), and with Japan on May 31, 1928 (46 Stat. 2446).

In 1925 the Spanish government announced its intention to patrol the waters for six miles off the Moroccan coast. Thereupon, Frank Kellogg, Secretary of State under President Coolidge, instructed the American Ambassador to Spain,

> * * * You may inform the Spanish Government that this Government does not recognize the right of either the Spanish or French Government to interfere with American vessels outside the three mile limit, as recognized by international law * * *. [Letter of July 31, 1925. 1 Hackworth, *Digest of International Law* (1940) 639.]

On August 29, 1934, the Ecuadorean government promulgated Maritime Fishing and Hunting Regulations asserting control over territorial waters to a width of six miles, and subsequently the American fishing vessel *Seaboy* was detained and fined for fishing within that limit. By letter of June 1, 1935, Assistant Secretary of State Sumner Welles instructed Antonio C. Gonzales, American Minister to Ecuador, to file a protest over that assertion of sovereignty beyond the three-mile limit, including the following (4 *Foreign Relations of the United States,* 1935, p. 514, 516):

> My Government has consistently recognized this three-mile limit in its exercise of general jurisdiction, including jurisdiction with regard to fisheries, in the waters surrounding its coasts and cannot admit the right of the Ecuadorean Government to apply its fishing regulations to American vessels

beyond the belt of three miles from low water mark.

That protest was repeated by letter of October 31, 1936, from Edward J. Sparks, American chargé d'affaires in Ecuador, to A. I. Chiriboga, Ecuadorean Foreign Minister. 5 *Foreign Relations of the United States,* 1936, p. 531.

A Mexican presidential decree of August 29, 1935, undertook to extend the breadth of Mexican territorial waters from three to nine miles. 1 Hackworth, *Digest of International Law* (1940) 639. On instructions from the Department of State, Josephus Daniels, American Ambassador to Mexico, on March 7, 1936, wrote to Eduardo Hay, Mexican Foreign Minister, reserving American rights in the matter, as follows (5 *Foreign Relations of the United States,* 1936, p. 759):

> I have the honor, under instructions from my Government, to refer to the Presidential Decree of August 29, 1935, published in the *Diario Oficial* of August 31, 1935, which purports to amend existing laws so as to extend the territorial waters of Mexico in breadth from three to nine nautical miles.
>
> It is the desire of my Government to inform the Government of Mexico that the United States of America reserves all rights of whatever nature so far as concerns any effects upon American commerce from enforcement of this legislation.

When Mexico, in reply, referred to Article V of the Treaty of Guadalupe Hidalgo, February 2, 1848, 9 Stat. 922, 926, as justifying the claim of nine miles (5 *Foreign Relations of the United States,* 1936, p. 760), Pierre de L. Boal, American chargé d'affaires ad in-

terim, wrote to the Mexican Foreign Minister on June 3, 1936, reasserting this country's position that the treaty provision extending the international boundary three leagues into the Gulf of Mexico was meant to do nothing more than permit jurisdiction to that distance at that particular point, for the prevention of smuggling (99 Cong. Rec. 3623-3624):

> I have the honor under instructions from my Government to acknowledge Your Excellency's courteous note No. 4002 of May 6, 1936, regarding the extension of the breadth of Mexican territorial waters, and to make the following comment thereon:
>
> The Foreign Office relies upon provisions of article V of the treaty of February 2, 1848, between the United States and Mexico and correspondence concerning such provisions to sustain its position that the decree in question is "just and proper" and that the reservation of rights made by the Government of the United States was unwarranted.
>
> The treaty provisions in question read as follows:
>
> "The dividing line between the two Republics shall begin in the Gulf of Mexico three leagues from land at the mouth of the Rio Grande."
>
> The Foreign Office has not taken into account the remaining words of the paragraph from which the quotation is taken, which words delimit the boundary line between its eastern end in the Gulf of Mexico and its western end which is said to be "the Pacific Ocean." It will be observed that the western limit of the boundary line is not stated to be

"three leagues from land." Moreover, the second paragraph of article V of the treaty of 1848 contains the following provision as to the western limit of the boundary line between the two countries:

"and, in order to preclude all difficulty in tracing upon the ground the limit separating Upper from Lower California, it is agreed that the said limit shall consist of a straight line drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point on the coast of the Pacific Ocean, distant one marine league due south of the southernmost point of the port of San Diego."

It will be further observed that in the last quoted provisions of the article upon which the Mexican Foreign Office relies, the westernmost point of the boundary line between the two countries is stated as being on the coast of the Pacific Ocean.

That portion of article V of the treaty of 1848 which the Mexican Foreign Office quotes relates only to the boundary line at a given point and furnishes no authority for Mexico to claim generally that its territorial waters extend 9 miles from the coast. The British note of June 9, 1848, which is quoted by the Mexican Foreign Office recognizes the merely local applicability of the agreement between the United States and Mexico as to the easternmost part of the boundary line, when it states in giving notice that the British Government could not "acquiesce in the extent of maritime jurisdiction assumed by the United States and Mexico," that the giving of such notice is "the more necessary because the Gulf of Mexico is a great thoroughfare of maritime commerce."

Furthermore, this view of the restricted nature of the agreement is strengthened by the statements in the note of the Department of State to the British Minister of August 19, 1848, which is also quoted by the Mexican Foreign Office, and wherein it was said that if for the "mutual convenience" of the United States and Mexico it had been proper to enter into such an arrangement, third parties had no just cause of complaint and that the Government of the United States never intended by the stipulation to question the rights which Great Britain or any other power may possess under the law of nations.

Presumably it is true as indicated by a note sent by this Department to the British Minister of January 22, 1875, that the arrangement thus made between the United States and Mexico with respect to the Gulf of Mexico was designed to prevent smuggling in the particular area covered by the arrangement.

Wholly aside from the question of the boundary line between the two countries, there remains to be considered the total great extent of the Mexican coast and the bordering territorial waters. To say that because the United States agreed that in one area, so far as the United States was concerned, Mexican territorial waters extended 3 leagues from land, therefore Mexico was entitled to claim such an extent of territorial waters adjacent to her entire coastline is a deduction which the terms of article V of the treaty of 1848 do not warrant.

The Mexican Foreign Minister replied on July 8, 1936, repeating his former position (5 *Foreign Rela-*

tions of the United States, 1936, p. 764), to which Ambassador Daniels replied on August 25, 1936 (*id.*, 769):

> I have the honor, under instructions from my Government and with reference to the Foreign Office's note No. 5470 of July 8, 1936, regarding the extension of the territorial waters of Mexico, to inform Your Excellency that so far as concerns the bearing upon this matter of the provisions of Article V of the treaty of February 2, 1848, between the United States and Mexico, my Government reiterates the views expressed in my note No. 1635 of June 3, 1936.
>
> It is noted that the Foreign Office expresses the view that there exists among the nations no fixed rule for determining the extent of the territorial sea. However this may be (and my Government must not be understood as admitting that there is no such rule) it seems to be established that, generally speaking, the principal maritime powers have adopted the three-mile limit.
>
> I am instructed, therefore, by my Government to reiterate the reservation made in my note No. 1438 of March 7, 1936, namely, that the United States of America reserves all rights of whatever nature so far as concerns any effects upon American commerce from enforcement of the presidential decree of August 29, 1935, which purports to amend existing law so as to extend the territorial waters of Mexico in breadth from three to nine nautical miles. I hope that Your Excellency will understand that in bringing this matter to the Foreign Office's attention my action is not taken with a view to prolonging the argument with the Mexican

> Government but merely to make it clear that the Government of the United States is unable to accept the conclusions of the Mexican Government as set forth in the latter's note of July 8, 1936.[21]

When Honduras amended its constitution so as to claim a marginal belt of 12 kilometers (about 6.479 geographic miles), John D. Erwin, the American Minister, wrote to Laínez Espinosa, Honduran Acting Foreign Minister, on November 4, 1937 (5 *Foreign Relations of the United States*, 1937, p. 597):

> I have the honor to refer to Article 153 of the Honduran Constitution of 1936, which reads in part as follows:
>
> "To the State appertains the full dominion, inalienable and imprescriptible, over the waters of

[21] In the Reply of the State of Louisiana to Brief of the United States on Motion for Judgment [on original complaint], it is said (pp. 56-57) that this correspondence "terminated in a letter from the Department of State to the Mexican foreign office on May 23, 1936", in which the United States "admitted that Mexican territorial waters extended three leagues from land in the Gulf of Mexico by virtue of the terms of the Treaty of Guadalupe Hidalgo, and limited its protest to that portion of the coasts of Mexico which bordered on the Pacific Ocean." The letter referred to, from which an extract is there quoted, was a letter of instruction from Robert Walton Moore, Assistant Secretary of State, to Ambassador Daniels. 1 Hackworth, *Digest of International Law* (1940) 640-641. Mr. Boal's letter of June 3, 1936, to the Mexican Foreign Minister (*supra*, pp. 84-87) closely followed those instructions. A reading of the entire letter, as set out above, shows that it did not withdraw the American protest as to the Gulf of Mexico; and this is emphasized by the subsequent note of August 25, 1936, *supra*, reiterating the original protest of March 7, 1936, which clearly referred to both the Pacific Ocean and the Gulf of Mexico. See also the subsequent protest of January 14, 1948, *infra*, pp. 90-92, regarding episodes in the Gulf of Mexico.

the territorial seas to a distance of twelve kilometers from the lowest tide mark . . .'' [22]

In this connection, I have the honor to inform Your Excellency that I have received instructions from the Acting Secretary of State of my Government to the effect that the Government of the United States of America reserves all rights of whatever nature with regard to any effects upon American interests from an enforcement of this Constitutional provision so far as it asserts that the territorial waters of Honduras extend beyond the three-mile limit, namely, a distance of three nautical miles from the line of mean low water.

The Mexican boundary question recurred in 1946, when Mexico detained some American boats that had been fishing off the coast of Campeche at a distance of more than three miles. On January 14, 1948, Walter Thurston, American Ambassador to Mexico, protested to Jaime Torres Bodet, Mexican Foreign Secretary (see Senate Interior Committee Hearings on S. J. Res. 13, 83d Cong., 1st Sess., 322):

I have the honor to refer to Your Excellency's note No. 52602 of February 18, 1947, concerning the interception and detention, in September 1946, of four United States fishing vessels which had been operating off the coasts of the State of Campeche.

In the note under reference the statement is made that the territorial waters of Mexico, in the relations between the United States and Mexico,

[22] English translation substituted by the editors of *Foreign Relations* for the original Spanish text.

have an extension of 9 miles, which extension, it is stated, is derived from interpretations of article V of the treaty of 1848 and of article I of the treaty of 1853 between the United States and Mexico. The Government of the United States maintains, and has consistently maintained, that the general territorial jurisdiction of Mexico, so far as United States nationals are concerned, extends 3 miles seaward from the coast measured from the low-water mark. In this regard Your Excellency's attention is invited to this Embassy's note of June 3, 1936, addressed to Your Excellency's Government, which, after discussing at length the treaty of 1848, pointed out that it furnished no authority for the Government of Mexico to claim generally that the territorial waters of Mexico extend 9 miles from the coast. The same conclusion necessarily applies to the treaty of 1853 which, in regard to the question of territorial waters, introduced no change in the terms or meaning of the treaty of 1848.

With reference to article 17, section II, of the General Law of National Wealth referred to in Your Excellency's note and stated to be the justification of the seizures, the United States cannot, so far as that law purports to define the territorial waters of Mexico as coastal waters to the distance of 9 nautical miles from land, accept its application to United States fishing vessels operating between 3 and 9 miles off the coast. Further, the Government of the United States continues, as in 1936, to reserve all rights of whatever nature so far as concerns any effects upon American commerce from enforcement of this legislation, or of

similar legislation which purports to extend the limit of general jurisdiction beyond 3 nautical miles.

On May 28, 1949, the government of Saudi Arabia promulgated a decree asserting sovereignty in the Persian Gulf more than three miles from shore. 43 American Journal of International Law, Supplement (1949) 154. On December 19, 1949, the United States sent a note of protest, reserving its rights, saying in part,

> The United States has taken note of Decree No. 6/4/5/3711 * * * and finds itself compelled to take exception to certain provisions thereof, deeming such provisions to be unsupported by accepted principles of international law, and to reserve all its rights and the rights of its nationals with respect thereto, namely: * * *
>
> * * * * *
>
> 2. All provisions to the effect that the coastal sea, i.e., the marginal sea, of the Kingdom extends seaward of a belt of three nautical miles along its coast or around its islands. [44 American Journal of International Law (1950) 675.]

On October 12, 1949, Senator Tom Connally wrote to Secretary of State Dean Acheson, setting forth arguments in support of Texas' claim to a three-league boundary, and asking whether the State Department recognized such a boundary as binding on Mexico and its citizens or on the United States and its citizens, and whether there were pending any objections by other nations to such a boundary. Senate Interior

Committee Hearings on S. J. Res. 13, etc., 83d Cong., 1st Sess., 319. To that inquiry, James E. Webb, Under Secretary of State, replied at length on December 30, 1949. He said, in part:

> This Government consistently has adhered to the view that 3 geographical miles constitute the extent of the marginal sea. * * *
>
> * * * * *
>
> Accordingly, this United States Government claims and asserts an extent of territorial waters in the Gulf of Mexico and elsewhere along its coasts of 3 marine miles. It does not recognize any claim other than its own as binding in the relations of the United States with foreign nations. It does not, therefore, recognize the Texas claim of 3 leagues as binding for international purposes and does not recognize the Texas claim as binding upon Mexico or the nationals of Mexico.
>
> Upon the same principles this Government does not recognize that the United States or its nationals are bound by claims of Mexico to a breadth of territorial waters greater than 3 marine miles. * * *
>
> * * * * *
>
> This Government has therefore consistently denied that the Government of Mexico has an extent of territorial waters of 3 leagues in the Gulf of Mexico, whether based upon treaty or upon international law. This Government would find it difficult now to assert or support a claim over Mexican nationals in the high seas of the

Gulf of Mexico off its coasts which it denies to the Mexican Government with respect to American nationals. [Senate Interior Committee Hearings on S. J. Res. 13, etc., 83d Cong., 1st Sess., 321. The accompanying enclosures, other than those classified "Confidential", are set out at 99 Cong. Rec. 3620-3625.]

In connection with the attempted codification of the international law relating to the regime of the high seas, the United States Mission to the United Nations, on January 6, 1950, sent the International Law Commission a memorandum in which it said (U. N. General Assembly, A/CN.4/19 (23 March 1950) 104):

> The United States has from the outset taken the position that its territorial waters extend one marine league, or three geographical miles (nearly 3½ English miles) from the shore * * *. The rule of the three-mile limit has been incorporated in several U. S. Treaties * * *.

On November 12, 1952, the United States protested in the following terms the claims of the Russian government to jurisdiction over more than three miles of territorial waters (99 Cong. Rec. 4084-4085):

> I have the honor to inform your Excellency that the Government of the United States of America has noted with increasing concern the policy of the Union of Soviet Socialist Republics of asserting territorial jurisdiction over a belt of waters 12 nautical miles in breadth along its coasts and coasts under its control. My Gov-

ernment has also noted that in pursuing this policy the Soviet Union is permitting its authorities to violate the rights of nationals of other states in what are generally recognized as international waters by ordering the seizure and detention of foreign-flag vessels between 3 and 12 nautical miles off the coasts and otherwise denying them access to that area.

It is the view of my Government that the Soviet Union, in thus attempting to appropriate to its exclusive use and control a portion of the high seas, has manifested a willingness to deprive other states, without their consent, of rights under international law. Such conclusion is inescapable in the face of a territorial-waters policy whereunder the Soviet Union would supplant free and untrammeled navigation by all vessels and aircraft over water areas comprising a part of the high seas, with such controls as that Government might apply. The Government of the United States of America is not aware of any principle of international law which would support and justify such a policy. In the circumstances, my Government finds it necessary to reiterate that it cannot recognize the action of any government which is calculated to assimilate adjacent high seas to its territory.

The Government of the United States of America therefore protests the Soviet Union's closure of a 12-mile belt of waters contiguous to its coasts and to the coasts under its control, and reserves all its rights and interests of whatever nature in the high seas outside 3 nautical miles from those coasts.

Addressing Committee VI (the Legal Committee) of the United Nations on December 14, 1956, Edward S. Greenbaum, Alternate United States Representative, repeated this country's strong advocacy of adherence to the three-mile rule. He said, in part (Press Release No. 2557, U. S. Mission to the U. N., Dec. 14, 1956):

> There have been several statements that this three-mile rule is an obsolete one. It has been suggested that because it is an old rule it is no longer valid for the modern world. My Government certainly does not accept this point of view. Our attitude on the breadth of the territorial sea is based in large part upon our traditional and strong adherence to the principle of the freedom of the sea, a principle under which the oceans of the world are to be open freely to the ships of all nations, large and small, and under which principle the strong nations are prevented from asserting their power to control the seas at the expense of the weak. We do not think that changes have occurred on the international scene which require the abandonment of the three-mile rule.[23]

The United Nations Conference on the Law of the Sea was held at Geneva, Switzerland, from February 24 to April 28, 1958, for the purpose of drafting a convention codifying the law on that subject. On March 11, 1958, Arthur H. Dean, chairman of the United States delegation, addressed the First Committee (the committee on the territorial sea), strongly

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[23] See also *infra*, pp. 121-123, for official statements of representatives of the State Department during the consideration of the proposed Submerged Lands Act.

advocating the three-mile rule and reviewing the United States' historic insistence on it. Department of State Bulletin, Vol. 38, No. 980, April 7, 1958, pp. 574-581; Appendix B, *infra,* pp. 348-362. He stressed the desirability of keeping the sea open to all to the greatest extent possible, the difficulties of navigation at greater distances than three miles from shore-based lights and landmarks, the expense of administering larger marginal sea areas, and the increased danger that larger areas would be violated and abused by belligerents, and said (Appendix B, *infra,* p. 361):

> It is the view of my Government, without elaboration or citation of authorities or making an extended legal argument at this time, that the 3-mile rule is established international law; that it is the only breadth of territorial waters on which there has ever been anything like common agreement; and that unilateral acts of states claiming greater territorial seas are not only not sanctioned by any principle of international law but are indeed in conflict with the universally accepted principle of the freedom of the seas.

During the conference, however, it became evident that it would not be possible to secure general agreement to the three-mile rule. Thereupon, the United States, feeling that agreement, even on a less desirable rule, would be better than no agreement at all, proposed as a compromise the adoption of six-mile territorial limits plus an additional six-mile zone for control of fishing. The speech in which Mr. Dean presented that proposal to the committee on April 16, 1958, is set

out in Appendix B, *infra*, p. 362. He said of the proposal:

> It represents a change in the position that my government has maintained consistently since 1793.
>
> We are making this proposal, at what we regard as a very real and substantial sacrifice to our own interests. Other than the common good we have nothing to gain out of it.
>
> * * * * *
>
> You may well ask whether this represents any change in our firmly held conviction that a maximum three-mile limit is best for us and best for all?
>
> It does not. In our own interests we have no wish to change.
>
> Our proposal represents, instead, our honest effort to find a common ground with those of you who sincerely disagree with us. That is the spirit of compromise, which can be achieved only through sacrifice on both sides.
>
> * * * * *
>
> In proposing to depart from a three-mile limit for the territorial sea, the United States of America, as one of the strong exponents of the three-mile territorial sea, has taken an historic step in order that we may reach agreement here.
>
> This was done with full realization of the serious implications of the action taken by my government on the public and private interests of our nationals throughout the world.

When the committee failed to reach any agreement on the width of the marginal sea, Mr. Dean said:

> My Government stands firmly upon the view that the three-mile limit is fully established as a principle of international law and that this principle can only be changed by agreement. If we do not agree, our work here will be a nullity and no statement, or proposal or argument, will have any effect whatsoever to extend the breadth of the territorial sea beyond three miles.

The American proposal was subsequently presented at a plenary session of the Conference, where it was approved by a majority of the 86 nations participating, but not by the two-thirds necessary for adoption. In remarks to the Conference following that rejection, on April 28, 1958, Mr. Dean again made clear the position of the United States that the three-mile rule is the only rule having past or present validity under international law, that the United States had only proposed that it be changed for the future by general agreement, and that the United States will not recognize the validity of any greater limit before such an agreement is reached. Appendix B, *infra*, pp. 369-370). He said, in part:

> Our offer to agree on a six-mile breadth of territorial sea, provided agreement could be reached on such a breadth under certain conditions, was simply an offer and nothing more. Its non-acceptance leaves the pre-existing situation intact.
>
> We are happy with the three-mile rule. In our judgment it is the principle giving the greatest opportunity to all nations, large and small, new and old, coastal and landlocked, because it is the doctrine most consistent with freedom of the seas,

a time-tested and universally recognized principle.

We have made it clear from the beginning that in our view the three-mile rule is and will continue to be established international law, to which we adhere. It is the only breadth of the territorial sea on which there has ever been anything like common agreement. Unilateral acts of States claiming greater territorial seas are not only not sanctioned by any principle of international law, but are, indeed, in conflict with the universally accepted principle of freedom of the seas.

Furthermore we have made it clear that in our view there is no obligation on the part of States adhering to the three-mile rule to recognize claims on the part of other States to a greater breadth of territorial sea. And on that we stand.

It is thus evident that the United States has never abandoned its position that the three-mile rule is the only rule that has been or now is sanctioned by international law, and that it will continue as such unless it is changed by international agreement. While the United States has offered to enter into such an agreement, fixing boundaries for the future at a maximum of six miles, plus a six-mile zone involving additional fishing rights, no such agreement has yet been reached.[23a] In the meantime, the American position stands unchanged. Even if an agreement were reached to change the three-mile rule, it would have only prospective operation. It

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[23a] The plenary session of the United Nations Conference on the Law of the Sea agreed to refer to the General Assembly the question of the desirability of holding another conference in the near future to work further with this problem. A/Conf. 13/L. 56, p. 9, 28 April, 1958.

could not affect the outcome of the present case, which depends on the law as it was when the defendant States entered the Union (between 1812 and 1845) or, in case of later Congressional approval of boundaries, as claimed by certain of the defendants, the law as it was at the time of such approval, in no event later than May 22, 1953, the date of the enactment of the Submerged Lands Act.

For the purpose of providing a definitive statement of the Government's official position regarding the three-mile rule with particular reference to the present case, Secretary of State Dulles on June 15, 1956, wrote to Attorney General Brownell, summarizing the history of this country's adherence to the three-mile rule and emphasizing that its importance as a national policy remains undiminished, as much with reference to the Gulf of Mexico as elsewhere. That letter is set out in full in Appendix B, *infra,* pp. 342-346. It concludes:

> It is no exaggeration to say that, in view of the serious attacks which are now being made upon the freedom of the seas in various parts of the world, the maintenance of the traditional three-mile policy is more than ever a matter of vital interest to the United States.

Subsequent to the termination of the Geneva Conference above referred to, the Acting Secretary of State supplemented the letter of June 15, 1956, with a letter dated May 9, 1958, in which he stated that the position taken in the earlier letter was still the official position of the United States and was in no way changed by the events taking place at Geneva. This letter is set forth in Appendix B, *infra,* p. 347.

(b). *The Court has recognized this action by the political branches of the Government*

This Court has also recognized the adherence of the United States to the three-mile rule. In *Cunard S. S. Co.* v. *Mellon,* 262 U. S. 100, 122, it said:

> It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles.

Similarly, in *United States* v. *California,* 332 U. S. 19, 33-34, the Court said:

> It did happen that shortly after we became a nation our statesmen became interested in establishing national dominion over a definite marginal zone to protect our neutrality. Largely as a result of their efforts, the idea of a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world * * *. That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. *Cunard Steamship Co.* v. *Mellon,* 262 U. S. 100, 122-124. And this assertion of national dominion over the three-mile belt is binding upon this Court. See *Jones v. United States,* 137 U. S. 202, 212-214; *In re Cooper,* 143 U. S. 472, 502-503.

The Court enumerated some of the actions of the "political agencies" to which it referred (332 U. S. at 33, fn. 18):

> Congressional assertion of a territorial zone in the sea appears in statutes regulating seals, fishing, pollution of waters, etc. 36 Stat. 326, 328; 43 Stat. 604, 605; 37 Stat. 499, 501. Under the National Prohibition Act, territory including "a marginal belt of the sea extending from low-water mark outward a marine league, or 3 geographical miles" constituting the "territorial waters of the United States" was regulated. See U. S. Treas. Reg. 2, § 2201 (1927), reprinted in *Research in International Law, supra* [23 A. J. I. L. (Spec. Supp. 1929)] 250; 41 Stat. 305. Anti-smuggling treaties in which foreign nations agreed to permit the United States to pursue smugglers beyond the three-mile limit contained express stipulations that generally the three-mile limit constitutes "the proper limits of territorial waters." See *e.g.*, 43 Stat. 1761 (Pt. 2).

(c). *The Submerged Lands Act adopted no change in this policy*

As we have already pointed out (*supra*, pp. 48-51), the Submerged Lands Act cannot properly be understood as a Congressional declaration or recognition that boundaries extending seaward more than three miles can have validity under international law or the law of the United States. Section 4, permitting extension of State boundaries to the three-mile limit (or to the international boundary in the Great Lakes or similar waters), provides that it is "without prejudice" to

more extended claims. That is qualified by Section 2(b), fixing for purposes of the Act a maximum limit of three miles in the Atlantic and Pacific and three leagues in the Gulf of Mexico, 43 U.S.C., Supp. V, 1301(b), 1312; Appendix A, *infra*, p. 334. A mere provision that the Act shall not prejudice claims beyond three miles is in no sense an endorsement of those claims, and does not give them any greater validity than they previously had. As Senator Holland explained (99 Cong. Rec. 2622; Appendix E, *infra*, p. 390):

> "* * * all that is done under this measure, by means of the only provisions of it that apply to this question, is to preserve in status quo the exact rights, whatever they may be, of the State of Florida and, likewise, of the State of Texas or any other State to be heard upon this question.

The provision was inserted because certain coastal States argued that they had existing, recognized boundaries extending more than three miles into the Gulf of Mexico, and Congress thought it better policy to leave those claims for judicial determination unaffected by the legislation in any way.[24] It would be paradoxical to suggest that Congress had improved the standing of those claims by providing that their status should remain unchanged. If the Act does not "prejudice" State claims of three-league boundaries, neither does it immunize them from the Government's contention that such boundaries have never had any validity under international law and the law of the United States. The Court remains free to examine the question to exactly

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[24] *Supra*, pp. 51-58.

the same extent that it could have done before the Act was passed.

The provision of Section 2(b), putting a maximum limit of three leagues in the Gulf of Mexico, was not intended to give any added validity to claims out to that limit. Its sole purpose was to avoid opening the way to claims more extensive than any then known to Congress. The provision was inserted by a floor amendment proposed by Senator Holland.[25] 99 Cong. Rec. 4114-4116. Senator Holland said of the provision:

> The words are words of limitation, not words of grant or release. [99 Cong. Rec. 4115.]
>
> * * * * * *
>
> * * * I am perfectly willing to meet the suggestions of my friends, some of whom have been opponents, and some of whom have been supporters of the joint resolution, to the effect that they would like to have the language more clearly spelled out than it was in the original measure, to the effect that there is no intention whatsoever to grant boundaries beyond 3 geographical miles in either the Atlantic or the Pacific, and that this Congress knows of no possible situation under which greater boundaries are claimed or could be granted in the Gulf of Mexico than 3 leagues; and, in that case, this Congress knows, although this amendment does not indicate it, that there are but 2 States affected by that particular situation.
>
> * * * * * *

[25] At the same time, he proposed and the Senate adopted an amendment eliminating reference to boundaries subsequently approved by Congress—likewise for the purpose of precluding claims of unknown magnitude. 99 Cong. Rec. 4114-4116.

Mr. LONG. With regard to Texas and Florida, these amendments do not propose to state that those States have a boundary of 3 leagues. They merely give them the right to establish that their boundary is 3 leagues.

Mr. HOLLAND. These amendments would not change the situation which has always existed. The States of Texas and Florida would simply be left where they were placed—the State of Texas by the action of Congress and its own action in 1845 and prior thereto, and the State of Florida by action of Congress in 1868 and its own prior action. We are simply left without prejudice in any way. The Senators from Florida and the Senators from Texas have made no attempt to have the boundaries of those States confirmed or reasserted, and, of course, we will not do so in this legislation. They stand for themselves as they existed at the time of admission or as heretofore approved by the Congress. [99 Cong. Rec. 4116.]

We believe it is evident from the materials we have set forth above that the United States from its earliest beginnings has been firmly committed to the rule that three miles is the maximum permissible extent of a nation's boundary into the sea, and that the Submerged Lands Act did not constitute a departure from that position.[26]

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[26] See also *infra*, pp. 107-127.

2. The Outer Continental Shelf Lands Act asserts federal rights of an extraterritorial character and does not grant any relevant rights to the States

Louisiana has alleged that the Outer Continental Shelf Lands Act "asserts the extent of the territorial boundaries of the United States as including the Outer Continental Shelf." Answer of the State of Louisiana [to original complaint], Par. III, p. 3. Even if the Outer Continental Shelf Lands Act had been an extension of national territorial limits, it would not necessarily follow that State boundaries were extended correspondingly. Plainly Congress did not intend that they should be. This is evident from the provisions of Section 4(a)(2), Appendix A, *infra*, p. 339, providing that the applicable law for the area shall be federal law, including by adoption the State laws in effect on the date of the Act, to be applied in the area "which *would be* within the area of the State *if its boundaries were* extended seaward to the outer margin of the outer Continental Shelf" (emphasis added), and Section 4(a)(3), Appendix A, *infra*, p. 340:

> The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

43 U.S.C., Supp. V, 1333(a)(2), 1333(a)(3). Since State rights in the resources of the continental shelf could only be acquired by congressional grant, it is im-

possible to see how the States can claim to have acquired any such rights under an Act which so explicitly declared that they should have none.

Finally, even if the Outer Continental Shelf Lands Act had been an extension of the national boundary, and even if it would necessarily follow that State boundaries were extended *pari passu*, still such extension would have come too late to benefit the States under the Submerged Lands Act. The grant made by that Act is limited to boundaries as they existed when a State entered the Union, or as approved by Congress before the effective date of that Act, May 22, 1953.[27] The Outer Continental Shelf Lands Act was not signed until August 7, 1953.

Louisiana's allegation, in addition to being irrelevant, is unsound. The Outer Continental Shelf Lands Act does not extend the territorial boundaries of the United States to include the outer continental shelf. What it does assert is that

> It is hereby declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act.

Section 3 (a), 67 Stat. 462, 43 U. S. C., Supp. V, 1332 (a), Appendix A, *infra*, pp. 338-339. It has always

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[27] As reported, S. J. Res. 13 applied equally to State boundaries that might be subsequently approved by Congress, but that was deleted on Senator Holland's motion. 99 Cong. Rec. 4114-4116. Section 4 of the Act does make it applicable to subsequent extensions of State boundaries out to the 3-mile limit, where States have not already claimed so far. 67 Stat. 31, 43 U.S.C., Supp. V, 1312. That is not involved here, as the Government concedes all the defendants' right to three miles under the Act.

been recognized that this asserts a special jurisdiction, extraterritorial in its nature, and does not constitute an extension of the territorial boundary of the Nation. That is shown by the qualified character of the language just quoted.

The contention that there can be no such thing as extraterritorial jurisdiction (Reply of the State of Louisiana to Brief of the United States on Motion for Judgment [on original complaint], 11-13) is obviously unsound. In *Vermilya-Brown Co.* v. *Connell,* 335 U.S. 377, 381-385, for example, the Court sustained the power of Congress to legislate for leased military bases in Bermuda, not under the sovereignty of the United States, and referred to other areas where the United States has legislative jurisdiction without sovereignty, such as the Canal Zone, the naval base at Guantanamo Bay, Cuba, and other leased bases. Islands brought under the Guano Islands Act of August 18, 1856, 11 Stat. 119, 48 U.S.C. 1411-1419, are under the jurisdiction but not the sovereignty of the United States. Opinion of the Solicitor for the Department of State, September 25, 1907, 1 Hackworth, *Digest of International Law* (1940) 503.[28] The United States exercises customs jurisdiction beyond its territorial limits, by

[28] "Under present conditions, however, the Island of Navassa, while not territory of the United States within the sense of the statutes above quoted [R.S. 4660, 4661], would seem to be, internationally speaking, within the jurisdiction of the United States * * *." See also letter of Jan. 3, 1907, from Assistant Secretary of State Bacon to Messrs. Dudley and Michener (*op. cit.*, 502), "* * * the United States possesses no sovereign or territorial rights over guano islands. United States citizens who discover guano * * * are protected by this Government in the prosecution of their enterprise which extends only to appropriation and disposal of guano thereon. * * *" Similar statements were made in State Department letters of July 22, 1907, July 13, 1914, April 28, 1922 and Sept. 1, 1932. *Ibid.*

making customs inspections of vessels within customs waters or customs-enforcement areas. Tariff Act of 1930, Sec. 581, as amended by the Anti-Smuggling Act of 1935, Sec. 203, 49 Stat. 521, 19 U.S.C. 1581. Customs waters are waters within four leagues of the coast, or such other distance as may be fixed by treaty as to vessels of the treaty nation. Anti-Smuggling Act of 1935, Sec. 201, 19 U.S.C. 1401(m). Customs-enforcement areas are areas of the high seas, adjacent to and extending not more than 50 miles from, customs waters, so designated by the President upon a finding that hovering occurs there. Anti-Smuggling Act of 1935, Sec. 4(a), 49 Stat. 517, 19 U.S.C. 1701(a). These examples of exercise by the United States of extra-territorial jurisdiction should suffice to show that it is a well recognized concept in our law, neither novel nor impossible as Louisiana asserts.

The assertion of an extraterritorial jurisdiction over the continental shelf seaward of national boundaries has achieved general recognition in international law. The American Law Institute's Tentative Draft No. 1 for a *Restatement of the Foreign Relations Law of the United States* (Apr. 26, 1957), in Part I, Chapter 2, Bases of Jurisdiction, Topic 4, Title B, Proximity to the Territory, discusses this and other bases for extra-territorial jurisdiction. It includes the following (pp. 50-53):

§ 23. Continental Shelf.

A state [29] has jurisdiction to establish and to enforce rules concerning the exploration, exploita-

[29] In this *Restatement*, "The term 'state,' unless the context clearly indicates otherwise, is used as referring to a state which has a distinct personality in international law, and which engages in foreign relations." *Op. cit.*, p. 4.

tion and related use of the continental shelf off its coast and beyond the seaward limit of its territorial waters, provided such rules do not interfere with the character as high seas of the waters above and navigation and fishing therein.

Comment:

a. The territory of a state extends to the seaward limit of its territorial sea. The waters beyond are high seas which by definition cannot be the territory of any state but belong to all. * * *

b. Assimilation of the high seas into the territory of a state is not a valid method of obtaining control of the oil and other resources in the continental shelf off its coast. It is inconsistent with the fundamental principle of freedom of the seas. It is also inconsistent with the basic nature of the concept of jurisdiction. Territory and jurisdiction are not co-extensive. The jurisdiction of a state extends much beyond its territory in many instances, as stated in §§9(c) and 21.[30] Extension of jurisdiction does not require in any sense an extension of territory. The jurisdiction may have a basis separate and distinct from the basis of territory.

c. The jurisdiction of a state over the continental shelf off its coast and beyond the seaward limit of its territorial sea rests essentially upon three grounds. The oil and other resources of the continental shelf constitute an economic wealth which

[30] Sec. 9(c) deals with jurisdiction to regulate conduct outside a nation's territory which has effects within that territory, reasonably closely related to the conduct. Sec. 21 deals with jurisdiction to enforce customs and immigration laws within a 12-mile zone (i.e., nine miles beyond the three-mile territorial limit).

must be developed. The continental shelf, being as it were an extension of the land masses which form the territory of states, proximity to the territory of the state determines who exploits its resources. Consistency with the principle of freedom of the seas may be readily achieved by expressly asserting jurisdiction *only* in the continental shelf, and not in the waters above it and the air space above them.

d. The United States has been particularly careful not only to limit its claims to the continental shelf but to disclaim expressly any claim of control in the waters above. * * *

* * * * *

e. The International Law Commission of the United Nations has stated that in its draft articles on the continental shelf, it desired to avoid language lending itself to interpretation alien to the fundamental object of safeguarding the full freedom of the superadjacent sea and air space above above it. For this reason, it was unwilling to accept the sovereignty of the coastal state over the continental shelf, although it was willing to point up the exclusive nature of the jurisdiction of the coastal state by stating that it "exercised sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources" (U.N., G.A., Official Records, Eleventh Session, Supp. No. 9 (A/3159), p. 42.)

f. No state has protested the assumption by the United States of jurisdiction over the continental shelf off its coast. Nor have similar assumptions

of jurisdiction over the continental shelf by other states been the object of opposition. * * *

* * * * *

The Report of the International Law Commission of the United Nations, covering the work of its eighth session, 23 April-4 July 1956, referred to in paragraph *e* of the comment, *supra*, contains the Commission's final report on the law of the sea. United Nations, General Assembly, Official Records: Eleventh Session, Supplement No. 9 (A/3159). Article 68 of that Report is as follows (p. 42):

> The coastal State [81] exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.

The commentary on the foregoing article includes the following:

> (2) The Commission desired to avoid language lending itself to interpretations alien to an object which the Commission considers to be of decisive importance, namely, the safeguarding of the principle of the full freedom of the superjacent sea and the air space above it. Hence it was unwilling to accept the sovereignty of the coastal State over the seabed and subsoil of the continental shelf. On the other hand, the text as now adopted leaves no doubt that the rights conferred upon the coastal State cover all rights necessary for and connected

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[81] The word "State" is of course used throughout the report in its international law sense of a sovereign nation having international relations. Cf. fn. 29, *supra*, p. 110.

with the exploration and exploitation of the natural resources of the continental shelf. Such rights include jurisdiction in connexion with the prevention and punishment of violations of the law. The rights of the coastal State are exclusive in the sense that, if it does not exploit the continental shelf, it is only with its consent that anyone else may do so.

The United Nations Conference on the Law of the Sea, held at Geneva, February 24 to April 28, 1958, adopted as part of its "Convention on the Continental Shelf" the following Articles (A/CONF. 13/L.55, 28 April 1958):

Article 1

For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Article 2

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.

2. The rights referred to in paragraph 1 of this

article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State.

3. The rights of the coastal State, over the continental shelf do not expend on occupation, effective or notional, or on any express proclamation.

4. The natural resources referred to in these articles consist of the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.

Article 3

The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

Article 4

Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables or pipe lines on the continental shelf.

As part of its Convention on the Territorial Sea and the Contiguous Zone it adopted the following articles (A/CONF. 13/L.52, 28 April 1958):

Article 1

1. The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

2. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law.

Article 2

The sovereignty of a coastal State extends to the air space over the territorial sea as well as to its bed and subsoil.

Plainly, the Government's claim of extraterritorial rights in the continental shelf is in accordance with current international law.

Legislative history shows complete recognition of the extraterritorial nature of our claim to the outer continental shelf. When the Outer Continental Shelf Lands Act was under consideration, Senator Ellender of Louisiana said (99 Cong. Rec. 7223),[32] "Technically, this bill would not extend the boundaries of the

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[32] This was the debate on S. 1901. The Outer Continental Shelf Lands Act as enacted is designated H. R. 5134, but its provisions are those of S. 1901, substituted by a Senate amendment. 99 Cong. Rec. 7264.

United States but would only extend the jurisdiction and control of the United States over the resources and subsoil of the seabed."

Senator Long of Louisiana offered an amendment which would have extended State and national boundaries to the edge of the continental shelf. For the present language of Section 3 (a), quoted above (*supra*, p. 103), it would have substituted the following (99 Cong. Rec. 7232):

> SEC. 3. Jurisdiction over outer Continental Shelf: (a) It is hereby declared that the seabed and subsoil of the outer Continental Shelf, the natural resources therein contained, and any structures which are erected on such subsoil or seabed for the purpose of exploring for, developing, removing, and transporting the natural resources of such subsoil or seabed, are within the territory of the United States.

Speaking in support of his amendment, Senator Long said (*ibid*):

> The amendment would extend the boundaries of the United States and the boundaries of the coastal States to include the seabed and subsoil of the outer Continental Shelf. * * *
>
> This amendment is in keeping with the better recognized practice of international law of extending the boundaries of a littoral nation to include the seabed and subsoil of the outer Continental Shelf. Thus far Great Britain and the other nations of the British Empire are among the 18 nations of this world that pursue the

> concept that a nation should extend its boundary to include the seabed and subsoil on the Continental Shelf without affecting the rights of navigation or fishing in the waters above the seabed.
>
> * * * * *
>
> Authorities in international law could see no serious objection to extension of national boundaries to include the seabed and subsoil. Insofar as any foreign nation is concerned, it amounted to a distinction without a difference whether we claimed the seabed and subsoil to be within our boundary or whether we declared the seabed and subsoil to be subject to the jurisdiction and control of the United States.

Senator Long's amendment was rejected. 99 Cong. Rec. 7236. That was perhaps primarily due to its provision for extension of State boundaries; nevertheless, the fact had been brought out clearly that the bill as introduced did not extend *federal* boundaries, and no change was made in that respect. Section 3 (a) was enacted exactly as it was reported by the Senate Committee. See S. Rept. No. 411, 83d Cong., 1st Sess., page 15.

In the course of the House debate on the Outer Continental Shelf Lands Act, Congressman Yorty of California said (99 Cong. Rec. 4888):

> Mr. Chairman, I cannot understand how anyone can seriously find fault with the action the committee has taken in considering the areas inside of historic State boundaries and [outside?] such boundaries in two separate bills because actually

I think we all recognize that two different sets of principles are involved in these areas. Inside the historic boundary we are dealing with an area that always belonged to the States until the decision of the Supreme Court cast doubt upon the title, but when you go beyond the historic seaward boundaries of the States you are dealing with an area that is altogether different. It is not only outside of the States, it is outside of the United States. We are dealing with it only on the legal basis of a proclamation of the President of the United States claiming, not title to the lands outside of the historic State and national boundaries, but rather claiming only the right to extract the resources of the seabed and the subsoil and to the edge of the Continental Shelf. Historically, legally, and in every way you are dealing with an entirely different proposition when you deal with the area known as the Continental Shelf.

That statement was made with reference to H. R. 5134 as originally introduced in the House.[33] That bill was in the form of an amendment to the Submerged Lands Act, and would have amended Section 9 of that Act to read, in part, as follows (99 Cong. Rec. 4891):

SEC. 9. Jurisdiction over outer Continental Shelf: (a) It is hereby declared to be the policy of the United States that the natural resources of the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of dis-

[33] See fn. 32, *supra*, p. 116.

position as provided in this act. Federal laws now in effect or hereafter adopted shall apply to the entire area of the outer Continental Shelf. * * *

* * * * *

This act shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to their free and unimpeded navigation and navigational servitude shall not be affected.

In thus limiting the continental shelf claim to the natural resources, rather than extending it to the seabed itself, H. R. 5134 conformed to Section 9 of the Submerged Lands Act, 67 Stat. 32, 43 U. S. C., Supp. V, 1302, and Presidential Proclamation No. 2667 of September 28, 1945, 59 Stat. 884 (Appendix C, *infra*, pp. 371-373), by which this Nation first asserted rights in the outer continental shelf. That proclamation was entitled, "Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf." It read, in part:

Whereas it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just * * *

Now, therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

* * * the Government of the United States regards the natural resources of the subsoil and

> sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. * * * The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

Designation of this as a "policy" rather than an extension of boundary, and reference to the resources as "appertaining to the United States, subject to its jurisdiction and control," rather than being incorporated into the United States, strongly imply that no boundary extension was involved. This is corroborated by the specific statement that the overlying water retains its character as high seas. Indeed, since the jurisdiction asserted was only over the natural resources, and not over the seabed itself, it would have been altogether impossible to describe it in terms of a boundary extension.

At the Senate Interior Committee hearings on the Submerged Lands Act, Jack B. Tate, Deputy Legal Adviser of the Department of State, testifying for that Department, said (Senate Committee on Interior and Insular Affairs, Hearings on S. J. Res. 13, 83d Congress, 1st Session, 1053, 1056):

> The claim made by the United States in the Presidential proclamation of September 28, 1945, to jurisdiction and control of the national [natural?] resources of the subsoil and seabed of the Continental Shelf off its coast is one more example of the compatibility between the United States position on the 3-mile limit and the protection of

its interests. This Government did not claim sovereignty in this proclamation or an extension of its boundaries beyond the limit of three miles of territorial waters. Indeed it specified in the proclamation that the character as high seas of the waters above the Continental Shelf and the right to their free and unimpeded navigation are in no way affected.

* * * * *

The Federal Government's claim as to territorial waters has always been 3 miles. The Federal Government's claim to the Continental Shelf has always been jurisdiction and control.

The same distinction was drawn by Thruston B. Morton, Assistant Secretary of State, in a letter written on March 6, 1953, to Senator Henry M. Jackson, which Senator Jackson put in the record of the Senate Interior Committee hearings on the Submerged Lands Act. Assistant Secretary Morton wrote, in part (Senate Committee on Interior and Insular Affairs, Hearings on S. J. Res. 13, 83d Cong., 1st Session, 1087, 1088):

This Nation has always supported the concept that the sovereignty of coastal States in seas adjacent to their coasts (as well as the lands beneath such waters and the airspace above them) is limited to a belt of 3 miles width, and has vigorously objected to claims of other States to broader limits. In international relations, the territorial claims of the States and of the Nation are indivisible. This Nation now supports the 3-mile limit

and the claims of the States cannot exceed those of the Nation. * * *.

This Nation has traditionally taken the position that it was not prevented by international law from reasonably exercising its jurisdiction beyond the 3-mile limit for certain purposes. Legislation is now in effect whereby this Government exercises jurisdiction over foreign as well as domestic vessels for purposes of customs control (Antismuggling Act of August 5, 1935, 49 Stat. 517, 19 U. S. C. 1701-1711). This exercise of jurisdiction is recognized in international practice. Exercises of jurdisdiction in the high seas for fiscal, sanitation, or navigation purposes are not infrequent. The claim made by the United States in the Presidential proclamation of September 20, 1945, to jurisdiction and control of the national resources of the subsoil and seabed of the Continental Shelf off its coast was without precedent. In keeping with its traditional position, however, this Government carefully refrained from suggesting that it was claiming sovereignty, or an extension of its territorial waters or boundaries, and, indeed, specified in the proclamation that the character as high seas of the waters above the Continental Shelf and the right to their free and unimpeded navigation were in no way affected.

In the Report of the Senate Interior Committee on the Submerged Lands Act (S. Rept. No. 133, 83d Cong., 1st Sess.), it was said (page 9):

The complexity of the problem presented by the assumption by the United States of jurisdic-

tion and control over the subsoil and seabed of the outer Continental Shelf is immediately apparent from even a cursory examination of the Presidential proclamation. The declaration is limited to jurisdiction and control of the resources of the land mass; as stated in the proclamation—

> the character as high seas of the waters above the Continental Shelf and the right to their free and unimpeded navigation are in no way thus affected.

Clearly, we have here neither absolute sovereignty nor absolute ownership.

It must follow that the interest of the United States is, from a national and an international standpoint, politically and legally, *sui generis*.

In the congressional debates on the Submerged Lands Act it was clearly recognized that the proclamation of September 28, 1945, did not assert an extension of our boundary. Thus, Congressman Hays of Ohio said (99 Cong. Rec. 2503):

> Any attempt to extend the boundaries of the United States or any of its constituent States to the edge of the Continental Shelf would result in the most serious problems involving the freedom of the seas. The careful wording of the 1945 Presidential proclamation has protected the interests of the United States to date, deviations from this would not be acceptable.

Congressman Feighan of Ohio emphasized the same point (99 Cong. Rec. 2518):

> In the President's Continental Shelf proclamation of 1945 which related to the sea bed and subsoil under the high seas beyond the marginal belt, the President was careful not to assert title, but merely jurisdiction and control. This area is clearly outside of territorial waters and thus in a domain where international considerations prevail.

The same point was brought out in the Senate. Senator Sparkman of Alabama said (99 Cong. Rec. 4086):

> Every President from George Washington to President Eisenhower, every Secretary of State from Thomas Jefferson to John Foster Dulles—each of them, without exception—has insisted on the 3-mile limit; and our country has opposed efforts on the part of any other nation to extend its limits beyond 3 miles. * * * Mr. Tate, who was representing the Secretary of State and the Department of State in the presentation before the committee, * * * called attention to the fact that the Government of the United States had made a claim for the resources out to the edge of the Continental Shelf. * * * But Mr. Tate differentiates between our right to take those resources and the right of ownership.

Senator Douglas of Illinois said (99 Cong. Rec. 4113):

> If * * * we do not push ownership beyond the 3-mile limit, but if we assert Federal control, which is a different matter, out from the 3-mile limit, we can then with good grace protect our fishermen as they fish close to the coast, but beyond the 3-mile limit, off Mexico, Canada, and possibly Siberia.

The Outer Continental Shelf Lands Act did broaden the subject matter of the claim, to include the seabed and subsoil instead of merely the natural resources therein. Sec. 3 (a), 67 Stat. 462, 43 U. S. C., Supp. V, 1332 (a), Appendix A, *infra*, p. 338. However, it made no change in the character of the rights claimed, but retained exactly the former language, saying,

> It is hereby declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act.

The report of the Senate Interior Committee said, with reference to this change (S. Rept. 411, 83d Cong., 1st Sess., p. 7):

> It will be noted that the proclamation asserted only that the Government of the United States "regards the natural resources of the subsoil and seabed" of the Continental Shelf as "appertaining to" the United States. The provisions of S. 1901 as reported carry this limited control a necessary step forward and extend the jurisdiction and control of the United States to the seabed and subsoil themselves.

Plainly, the change was only in the subject matter of the claim and not in its nature. This is fully borne out by the Senate debates on the Outer Continental Shelf Lands Act quoted above (*supra*, pp. 116-117).

It is thus apparent that both Congress and the Executive have consistently and purposefully maintained a distinction between our claim of rights in the outer

continental shelf and an extension of the national boundary. The distinction should not be disregarded here, where Congress has used "boundary" in defining the extent of the rights granted to the States, giving it a precise statutory definition. Submerged Lands Act, Sec. 2(b), 43 U.S.C., Supp. V, 1301(b), Appendix A, *infra*, p. 334.

3. THE LOCATION OF THE NATION'S MARITIME BOUNDARY IS A POLITICAL QUESTION IN THE FIELD OF FOREIGN POLICY, AS TO WHICH THE HISTORIC DETERMINATION BY THE POLITICAL BRANCHES OF THE GOVERNMENT MUST BE DEEMED CONCLUSIVE

(a). *It is a basic principle that the courts will accept executive determinations in the field of foreign affairs*

For reasons well grounded in the distribution of functions in our Government (*United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319-321; *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 111), this Court has always insisted that American courts "should not so act as to embarrass the executive arm in its conduct of foreign affairs." *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 35; *Ex parte Peru*, 318 U. S. 578, 588; see *United States* v. *Lee*, 106 U. S. 196, 209. Decisions in the field of foreign policy are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 111. The courts, therefore, are bound to accept as correct and conclusive all declarations and determinations with respect to foreign affairs and foreign

policy, made by the Executive Branch of the Government by formal rulings or official action taken in conducting the foreign affairs or formulating the foreign policy of the nation.

This general principle of judicial abstention from the domain of foreign affairs has been consistently applied in various fields touching on this country's international relations. For instance, the government recognized by the President as the government of a foreign sovereign state will be accepted without question (*Kennett* v. *Chambers*, 14 How. 38, 50-51; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *United States* v. *Belmont*, 301 U. S. 324, 330; *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 132-138), as will the "underlying policy" governing the executive recognition of the foreign government (*United States* v. *Pink*, 315 U. S. 203, 229) and executive recognition or non-recognition of another country's laws and ordinances (*Latvian State Cargo and Passenger Steamship Line* v. *McGrath*, 188 F. 2d 1000 (C. A. D. C.), certiorari denied, 342 U. S. 816; *The Maret*, 145 F. 2d 431 (C. A. 3); *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246, 249 (C. A. 2), certiorari denied, 332 U. S. 772). Similarly, a political determination of a state of war between foreign states is binding on the courts. *United States* v. *Palmer*, 3 Wheat. 610, 634-635; *The Divina Pastora*, 4 Wheat. 52, 63-64. A certification by the State Department that a foreign vessel libeled in our courts is state-owned and immune from seizure automatically leads to a dismissal of the action, whatever view of the vessel's immunity the court itself would have taken. *Ex parte Peru*, 318 U. S. 578, 588-590; *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 34-36. See *National*

City Bank v. *Republic of China*, 348 U. S. 356, 360-361. Certificates by the State Department to as the diplomatic character of foreign representatives sued in our courts are likewise followed without question. *In re Baiz*, 135 U. S. 403, 421-422, 432; *United States* v. *Benner*, 24 Fed. Cas. No. 14,568 (C. C. E. D. Pa.) at 1086. Even treaties from which private rights flow will normally not be interpreted contrary to a definite position taken by the executive *vis-à-vis* a foreign country, especially where judicial intervention might well cause difficulties in the larger sphere of foreign relations. *Foster* v. *Neilson*, 2 Pet. 253, 307-309; *Williams* v. *Suffolk Insurance Co.*, 13 Pet. 415; *United States* v. *Reynes*, 9 How. 127, 153-155; *Charlton* v. *Kelly*, 229 U. S. 447, 468, 474-476; *Sullivan* v. *Kidd*, 254 U. S. 433, 442; *Factor* v. *Laubenheimer*, 290 U. S. 276, 295; cf. Jaffe, *Judicial Aspect of Foreign Relations* (1933), 71-78. This principle of judicial deference to formal executive determinations applies not only where a foreign nation is directly involved (e. g., *Ex parte Peru*, 318 U. S. 578; *Republic of Mexico* v. *Hoffman*, 324 U. S. 30), but also where the direct controversy is wholly domestic. E. g., *United States* v. *Belmont*, 301 U. S. 324 (suit to recover money deposited by a Russian corporation with a New York banker); *United States* v. *Pink*, 315 U. S. 203 (suit to recover assets of a Russian insurance company in New York); *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103 (controversy between two domestic airlines).[34]

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[34] See also *The Federalist*, Nos. 3, 80; *Holmes* v. *Jennison*, 14 Pet. 540, 570; *Henderson* v. *Mayor of New York*, 92 U.S. 259, 273; *Chy Lung* v. *Freeman*, 92 U.S. 275, 279-280; *Chinese Exclusion Case*, 130 U.S. 581, 606; *United States* v. *Rauscher*, 119 U.S.

Whether a political determination made by the Government has been right or wrong is immaterial, so far as courts are concerned. As this Court said in *Jones* v. *United States,* 137 U.S. 202, 221, accepting the President's determination that Navassa island was subject to the sovereignty of the United States:

> * * * the duty of the judiciary is to decide in accordance with what the President, in the exercise of a discretionary power confided to him by the Constitution and laws, has actually done. * * * it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong; it is enough to know that in the exercise of his constitutional functions he has decided the question.

Accord, *Williams* v. *Suffolk Insurance Co.,* 13 Pet. 415, 420 (Buenos Ayrean non-jurisdiction over the Falkland islands); *Kennett* v. *Chambers,* 14 How. 38, 50 (jurisdiction of Mexico over Texas before American recognition of the Republic of Texas).

Thus, in *Rose* v. *Himely,* 4 Cranch 241, 272, where counsel had relied largely on the writings of Vattel in support of the contention that Santo Domingo, then in revolt against France, should be regarded as independent, the Court said, "But the language of that writer is obviously addressed to sovereigns, not to courts. It is for governments to decide, whether they will consider St. Domingo as an independent nation * * *."

The question in such a case is not of discovering an independent fact, but rather of learning what position

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407, 412-414; *Valentine* v. *U. S. ex rel. Neidecker,* 299 U.S. 5, 8; *Hines* v. *Davidowitz,* 312 U.S. 52, 63; *United States* v. *California,* 332 U.S. 19, 34-36.

has been taken by the Government on the subject. In *Engelke* v. *Musmann,* L. R. (1928) A. C. 433, 455 (H. L.), Lord Phillimore said, "* * * the exact inquiry in this case is not whether the defendant is a member of the Ambassadorial staff but whether he has been accepted and recognized by the Crown as such a member * * *." Similarly, in *Duff Development Co.* v. *Kelantan Government,* L. R. (1924) A. C. 797, 824-825 (H. L.), Lord Sumner said, "* * * it was not the business of the Court to inquire whether the Colonial Office rightly concluded that the Sultan was entitled to be recognized as a sovereign by international law. All it had to do was to examine the communication in order to see if the meaning of it really was that the Sultan had been and was recognized as a sovereign."

This rule results from the practical necessity that domestic adjudications not be at variance with the Government's international policy, and from the unsuitability of judicial processes as means of making the basic determinations involved. Thus, in *United States* v. *Ortega,* 27 Fed. Cas No. 15,971 (C.C. E.D. Pa.), the court (per Washington, Circuit Justice), after pointing out the intolerability of having a judicial decision at variance with the executive practice in a matter of state, continued (pp. 361-362):

> Besides, if it belongs to courts of justice to meddle with these matters, and looking beyond the acts and conduct of the president, to decide a person recognized by him as a foreign minister, to be no minister, surely that branch of the government ought to possess all the lights to guide their judgment which are possessed by the president, and should consequently be empowered to call for and

to expose to public view, the archives of state, and the correspondence of the executive of this nation with foreign nations, in relation to the subject on which the decision is to be made. Yet, who would be wild enough to maintain a proposition so extravagant and absurd?

(For similar reasoning, see *Chicago & S. Air Lines v. Waterman Corp.*, 333 U. S. 103, 111).

(b). *A statement by the appropriate Executive Department is the best source of information on a political question, and cannot be controverted*

As we have already said, at the outset of this litigation, the Secretary of State furnished the Attorney General with a statement, for presentation to the Court in this case, declaring that the policy of the United States has always been—at all times relevant to this case[35]—to recognize for other nations and to claim for itself sovereignty over adjacent seas only to a distance of three nautical miles from the coast. (*Supra*, p. 101.) That statement is set out in full in Appendix B, *infra*, pp. 342-346. We have already reviewed the position taken by the State Department throughout the history of the Nation, to show that the position which it took in that letter is the one which it consistently took on this question throughout our history. We submit, however, that the Secretary's statement alone is enough to conclude the matter here.

Numerous cases have declared and applied the prin-

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[35] See pp. 59-106, *supra*. In Appendix B, *infra*, p. 347, we set forth a recent letter from the Acting Secretary of State indicating that the events at Geneva in April 1958 have not altered the historic position of the United States.

ciple that the question of what political determination has been made in any matter by the Executive Branch of the Government can best be answered by a statement from the appropriate Department of that Branch, and that if such a statement is provided it must be accepted as conclusive and cannot be attacked by other evidence or inquiry. One of the earliest and most frequent applications of this principle was with respect to the question of whether a defendant was entitled to diplomatic immunity from suit. *In re Baiz*, 135 U.S. 403, was such a case. In response to an inquiry, the Second Assistant Secretary of State had written that, in the absence of the minister, "the business of the legation was conducted by Consul General Baiz, but without diplomatic character" (p. 408). The Court said (p. 432): "* * * we do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister, and therefore have the right to accept the certificate of the State Department that a party is or is not a privileged person, *and cannot properly be asked to proceed upon argumentative or collateral proof.*" (Emphasis added.) See also 135 U. S. at 421-422.

United States v. *Benner*, 24 Fed. Cas. No. 14,568 (C. C. E. D. Pa., 1830), was a prosecution for arresting a foreign diplomat, in violation of Section 25 of the Act of April 30, 1790, 1 Stat 112, 117-118. The United States Attorney introduced a certificate from the Secretary of State, declaring the diplomatic status of the man arrested; and the court thereupon charged the jury (*per* Baldwin, Circuit Justice, p. 1086):

> The evidence of the reception of Mr. Brandis in this [diplomatic] character, is the certificate

> from the secretary of the state which has been read. * * * the certificate of the secretary under the seal, oath, and responsibility of office, must also be taken as full evidence of the act certified. * * *
>
> * * * Such recognition invests him with the immunities of a minister, in whatever form it may be done, *and no court or jury can require any other evidence of a reception*: we instruct you then as a matter of law, that at the time of the alleged arrest, Mr. Brandis was a minister of Denmark in the character stated in the certificate. [Emphasis added.]

See also *United States v. Ortega*, 27 Fed. Cas. No. 15,971 (C. C. E. D. Pa., 1825) and *United States v. Liddle*, 26 Fed. Cas. No. 15,598 (C. C. D. Pa., 1808).

In the same way, the question of whether a libeled vessel is the property of a foreign sovereign and so immune from suit will be conclusively determined by an official statement that the Government so recognizes it. In *Ex parte Peru*, 318 U.S. 578, the Republic of Peru intervened in an admiralty proceeding to assert ownership of the libeled vessel, and sovereign immunity from suit. The Attorney General filed a certificate from the Department of State, recognizing the sovereign immunity of the ship. The Court said (p. 589):

> The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations. Upon the submission of this

> certification to the district court, it became the court's duty, in conformity to established principles, to release the vessel and to proceed no further in the cause.

See also *Compania Espanola* v. *Navemar*, 303 U.S. 68, 74; *Ex parte Muir*, 254 U.S. 522, 532-533; and cases there cited.

The same rule applies to questions of sovereignty or territorial jurisdiction. In *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, one question was whether the United States had acquired sovereignty over military bases in Bermuda which it leased from the British government. The Legal Adviser of the State Department wrote to the Attorney General that the United States had not acquired sovereignty, and the Court accepted that statement, saying (335 U.S. at 380-381):

> Recognizing that the determination of sovereignty over an area is for the legislative and executive departments * * * does not debar courts from examining the status resulting from prior action. * * * In the light of the statement of the Department of State, we predicate our views on the issue presented upon the postulate that the leased area is under the sovereignty of Great Britain and that it is not territory of the United States in a political sense, that is, a part of its national domain.

The British cases are to the same effect. In *The Fagernes*, L. R. (1927) P. 311 (C. A.), the court secured, through the Attorney General, a statement from the Home Secretary that the location in question, in the Bristol Channel, was not within the territorial

sovereignty of the Crown. Of this, Atkin, L. J., said (p. 324):

> What is the territory of the Crown is a matter of which the Court takes judicial notice. The Court has, therefore, to inform itself from the best material available; and on such a matter it may be its duty to obtain its information from the appropriate department of Government. *Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive.* [Emphasis added.]

Lawrence, L. J., said (pp. 329-330):

> * * * It is the duty of the Court to take judicial cognizance of the extent of the King's territory and, if the Court itself is unacquainted with the fact whether a particular place is or is not within the King's territory, the Court is entitled to inform itself of that fact by making such inquiry as it considers proper * * *.
>
> * * * * *
>
> *In view of this answer, given with the authority of the Home Secretary upon a matter which is peculiarly within the cognizance of the Home Office, this Court could not, in my opinion, properly do otherwise than hold that the alleged tort was not committed within the jurisdiction of the High Court.* [Emphasis added.]

In *Duff Development Co.* v. *Kelantan Government*, L. R. (1924) A. C. 797 (H. L.), where the House of Lords held that the question of defendant's status

as an independent sovereign should be settled by inquiry of the Colonial Secretary, Lord Sumner said (pp. 823-824):

> The status of foreign communities and the identity of the high personages who are the chiefs of foreign states, are matters of which the Courts of this country take judicial notice. Instead of requiring proof to be furnished on these subjects by the litigants, they act on their own knowledge or, if necessary, obtain the requisite information for themselves. I take it that in so doing the Courts are bound, as they would be on any other issue of fact raised before them, to act on the best evidence and, if the question is whether some new State or some older State, whose sovereignty is not notorious, is a sovereign State or not, *the best evidence is a statement, which the Crown condescends to permit the appropriate Secretary of State to give on its behalf.* [Emphasis added.]

In *Mighell* v. *Sultan of Johore*, L. R. (1894) 1 Q. B. 149 (C. A.), the question was whether the defendant was an independent sovereign, and the court referred the question to the Colonial Office. Kay, L. J., said in his opinion (pp. 161-162):

> * * * the means which the judge took of informing himself as to his [the defendant's] status was by inquiry at the Colonial Office. * * * I confess I cannot conceive a more satisfactory mode of obtaining information on the subject * * * *I think that statement must be taken as conclusive.* [Emphasis added.]

To the same effect are *Engelke* v. *Musmann*, L.R. (1928) A.C. 433 (H.L.) (diplomatic status of defendant); *Foster* v. *Globe Venture Syndicate*, L.R. (1900) 1 Ch. 811, 813 (sovereignty of Sultan of Morocco over Suss territories).

The conclusive effect of such a statement results from the fact that the statement is not in the nature of "evidence", but rather is an authoritative declaration by the Government regarding a matter within its peculiar competence to determine. "Such information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance." *Duff Development Co.* v. *Kelantan Government*, L. R. (1924) A. C. 797, 813 (H. L.) (opinion of Viscount Finlay); see also *Engelke* v. *Musmann*, L. R. (1928) A. C. 433, 442, 457 (H. L.), accord (opinions of Lord Buckmaster and Lord Warrington of Clyffe).[36]

(c). *These principles are controlling even in cases to which the United States is a party*

There is no element of unfairness in the proposition that the Government's own determination of a question must be accepted as conclusive in a case to which the

[36] In the *Engelke* case, Lords Warrington of Clyffe and Buckmaster both indicated that for this reason the official who made the statement was not subject to cross-examination. In the *Duff Development Co.* case, the Lord Chancellor said that when such information is obtained from a Government department "the Court does not permit it to be questioned by the parties" (L. R. (1924) A. C. 797, 805-806). In the *Foster* case, *supra*, the judge thought that information received from the Crown gave the court "a knowledge of facts that cannot be disputed," and in *Mighell*, *supra*, Kay, L. J., indicated that the purpose of securing such information was to avoid a "contentious inquiry."

United States itself is a party. It would indeed be anomalous to suggest that a question which must be answered in that way in all other litigation should be answered in a different way where the United States is a party. Moreover, the reasons for the rule have even greater cogency in Government litigation than in other cases, for the embarrassment to the Government which would be caused by judicial decisions at variance with the Government's political determinations would be infinitely greater where those decisions bound the Government, than where they only affected third parties. Of course, the Court is not deprived of jurisdiction by reason of the executive determination; the legal result of the application of the determination remains at issue, as in non-Government cases.

Accordingly, the practice has uniformly been to apply the same principle, whether the United States is a party or not. *Jones* v. *United States*, 137 U.S. 202 (*supra*, p. 130); *United States* v. *Benner*, 24 Fed. Cas. No. 14,568 (C. C. E. D. Pa.) (*supra*, p. 133); *United States* v. *Ortega*, 27 Fed. Cas. No. 15,971 (C. C. E. D. Pa.); and *United States* v. *Liddle*, 26 Fed. Cas. No. 15,598 (C. C. E. D. Pa.), were all criminal prosecutions by the United States. In each, the court held that it should accept a statement from the Department of State as a conclusive source of information on a political matter of which it was bound to take judicial notice. The status of the United States as a party in the *Ortega* case, *supra*, was clearly brought out on motion in arrest of judgment, made on the ground that the case, as one "affecting" an ambassador, was within the original jurisdiction of the Supreme Court. Denial of the motion was affirmed by the Su-

preme Court, which pointed out that although the case arose out of an assault on a foreign minister, the party plaintiff was not the minister but the United States. *United States* v. *Ortega*, 11 Wheat. 467; see 27 Fed. Cas. at p. 362. Where a political determination is involved, the answer given by the political branches of the Government must be accepted, whoever may be parties to the case, because that answer is itself the ultimate fact in issue. Whether the Government could or should have adopted a different policy is not a question for the courts.[37]

(d). *Territorial jurisdiction and sovereignty are political questions, as to which executive determinations and statements bind the courts*

As appears from the cases discussed above (as well as others), who is the sovereign of an area is a political question, the determination of which by one of the political branches of the Government is conclusive on the courts.

(i) Foreign territories.—In *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302, this Court, holding itself bound by an executive determination as to which was the lawful government of Mexico, said:

> The conduct of the foreign relations of our Government is committed by the Constitution to the

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[37] *Cf. Duff Development Co.* v. *Kelantan Government*, L.R. (1924) A.C. 797 (H.L.), where it was objected that the Colonial Office was in fact directing the litigation and other conduct of the very defendant which it was certifying was an independent sovereign. Lord Sumner, discussing this objection (pp. 823-825), concluded that, nevertheless, since the matter of sovereignty was one for judicial notice, and since a statement from the Colonial Office was the best source of information on the subject, the court was obliged to accept the statement as conclusive.

Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

In *Kennett* v. *Chambers*, 14 How. 38, 50-51, this Court refused to determine for itself whether Texas had in fact become independent of Mexico before 1837, when the Republic of Texas was formally recognized by our Government:

> It is a sufficient answer to the argument to say that the question whether Texas had or had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations. And until the period when that department recognized it as an independent state, the judicial tribunals of the country were bound to consider the old order of things as having continued, and to regard Texas as a part of the Mexican territory.

In *Jones* v. *United States*, 137 U. S. 202, 221, the Court held itself bound by the Executive's determination that the island of Navassa was not subject to the jurisdiction of Haiti. The Court said:

> * * * the duty of the judiciary is to decide in accordance with what the President, in the exercise of a discretionary power confided to him by the Constitution and laws, has actually done. As was adjudged, under like circumstances, in *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420, before quoted, if the executive, in his correspondence with the

> government of Hayti, has denied the jurisdiction which it claimed over the Island of Navassa, the fact must be taken and acted on by this court as thus asserted and maintained; it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong; it is enough to know that in the exercise of his constitutional functions he has decided the question.

Similarly, in *Williams* v. *Suffolk Insurance Co.*, 13 Pet. 415, 420, in holding itself bound by the executive determination that the Falkland-Islands were not subject to the jurisdiction of Buenos Aires, this Court said:

> And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view, it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he had decided the question. Having done this, under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

See also *Pearcy* v. *Stranahan*, 205 U. S. 257, 265.

(ii) Territory of the United States.—This rule is equally applicable to the determination of whether particular areas are within the sovereignty of the United States. In *Vermilya-Brown Co.* v. *Connell*, 335 U. S.

377, 380-381, regarding the question of whether Bermudan military bases leased from Great Britain by the United States were subject to the sovereignty of the latter, this Court said:

> * * * is this a political question beyond the competence of courts to decide? * * * Recognizing that the determination of sovereignty over an area is for the legislative and executive departments * * * does not debar courts from examining the status resulting from prior action.

As noted above, the Court accepted the statement of the Legal Adviser of the State Department that "The arrangements under which the leased bases were acquired from Great Britain did not and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States."

In *Jones* v. *United States,* 137 U. S. 202, *supra,* this Court held itself concluded by an executive determination that the island of Navassa had been brought under the jurisdiction of the United States under the Guano Islands Act of August 18, 1856, 11 Stat. 119, 48 U. S. C. 1411-1419. Similarly, an executive determination that the Isle of Pines was not territory of the United States was held conclusive in *Pearcy* v. *Stranahan,* 205 U. S. 257. Accord, *Foster* v. *Neilson,* 2 Pet. 253, 307-309.

Specifically, executive determinations have been accorded judicial recognition as being decisive of the question of American sovereignty over the waters bordering our coasts. Thus, in *In re Cooper,* 143 U. S. 472, the Court indicated that it would be bound by what it understood to be an executive determination that the jurisdiction of the United States extended to

all the waters of the Bering sea east of the demarcation line described in the Russian cession treaty of March 18/30, 1867 (15 Stat. 539), whether or not within three miles of the shore.[38] Following the same principle, the ruling of Attorney General Randolph that Delaware Bay was inland water within the sovereignty of the United States (1 Op. A. G. 32 (1793)) was relied on by the Second Court of Commissioners of *Alabama* Claims, in holding the Chesapeake Bay similarly territorial. *The Alleganean: Stetson* v. *United States*, 4 Moore, *International Arbitrations*, 4332, 4341. Similarly, Secretary of State Jefferson's letter to Minister Genet (*supra*, p. 60), asserting jurisdiction over a marginal belt of three miles, was one of the authorities relied on by this Court in *United States* v. *California*, 332 U. S. 19, 33-34, in saying:

> That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact. * * *

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[38] After *In re Cooper* was decided in 1892, the United States disavowed all claim to own the waters of the Bering sea more than three miles from land. 12 *Fur Seal Arbitration, Proceedings of the Tribunal of Arbitration at Paris, 1893*, Oral Argument for the United States, pp. 107-110 (*infra*, p. 175). This does not, of course, detract from the force of the Court's prior indication that it would consider itself bound by the executive action in the matter. Indeed, the United States was careful to point out to the arbitration tribunal that the courts, in deciding *In re Cooper* and similar cases, had felt themselves bound by the actions of the political branches of the Government, observing that "Lastly, the United States courts, whenever the question has come up before them, have refused to interfere with the executive branch of the Government in its interpretation of the treaty of 1867 and of the laws of Congress enacted on the basis of what the United States acquired by this treaty." 2, *op. cit.*, Case of the United States, p. 84.

> And this assertion of national dominion over the three-mile belt is binding upon this Court.

As is shown, *supra*, pages 59-106, the political branches of the Government have consistently adhered to the rule that this country has a marginal belt of three miles and no more.[39] The concept of a marginal belt of territorial water, subject to the sovereignty of a coastal nation, is an encroachment upon the general principle of freedom of the seas. The determination of how far a nation shall thus undertake to detract from the common right of all nations in the high seas is manifestly a matter of foreign policy, inextricably linked with the converse question of how far the nation shall insist on asserting for itself the freedom of the seas as against claims of territorial waters asserted by other littoral nations. The character of this question as one of foreign policy has been explicitly recognized by this Court:

> Not only has acquisition, as it were, of the three-mile belt been accomplished by the National Government, but protection and control of it has been and is a function of national external sovereignty. * * * This country, throughout its existence has stood for freedom of the seas, a principle whose breach has precipitated wars among nations. The country's adoption of the three-mile belt is by no means incompatible with its traditional insistence upon freedom of the sea, at least so long as the national Government's power to exercise control

[39] In *United States* v. *California*, 332 U.S. 19, 33-34, fn. 18, the Court recognized Congressional assertions of a three-mile territorial zone. See *supra*, p. 103.

> consistently with whatever international undertakings or commitments it may see fit to assume in the national interest is unencumbered. * * * But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations.

United States v. *California*, 332 U.S. 19, 34-35. Again, in *United States* v. *Louisiana*, 339 U.S. 699, 704, the Court said:

> Protection and control of the [marginal sea] area are indeed functions of national external sovereignty. * * * The problems of commerce, national defense, relations with other powers, war and peace focus there.

To the same effect is the statement in *United States* v. *Texas*, 339 U.S. 707, 719, "once low-water mark is passed the international domain is reached."

This view is amply supported by the history of this country's assertions of its claims over territorial waters. As we have shown (*supra*, pp. 60-62), its claim to jurisdiction over a three-mile belt had its beginning in diplomatic communications by Thomas Jefferson as Secretary of State in 1793. It has been crystallized and maintained through diplomatic negotiations and has been established by international treaties throughout the nation's history (*supra*, pp. 62-101). During

all this time it has been regarded, as it necessarily is, as a facet of our policy of insisting on freedom of the seas more than three miles from the coasts of other nations. See, for example, the statement of the American delegate at the arbitration of the whaling and sealing claim of the United States against Russia, July 4, 1902: "The Government of the United States *claims and admits* the jurisdiction of any State over its territorial waters only to the extent of a marine league * * *" (*supra*, pp. 78-79; emphasis added.)

It is apparent that the extent of American jurisdiction over the marginal sea is necessarily a question of foreign policy, has always been so regarded, and has been dealt with in that light. As such, the subject is one on which the decision made by the political branches of the Government should be accepted as conclusive here.

4. ALTHOUGH THE PRESENT CONTROVERSY IS WHOLLY DOMESTIC, NATIONAL FOREIGN POLICY MUST CONTROL ITS DECISION

The amended complaint alleges that decision of this controversy involves inquiry into and application of the foreign policy of the United States regarding the territorial extent of the jurisdiction claimed by the United States over the marginal sea. Amended Complaint, First Cause of Action, Par. IX, pp. 5-6.[40] In

[40] This allegation was made in the original complaint as a ground for invoking the original jurisdiction of this Court. In the amended complaint it was not considered necessary to repeat it as to the newly added defendants, since the Court had already taken jurisdiction of the case and ordered their joinder. *United States* v. *Louisiana*, 354 U.S. 515. As a principle governing the manner in which the case should be decided, however, we of course consider it equally applicable to all defendants.

reply, Louisiana alleges that the controversy is wholly domestic and internal and concerns no foreign power. Answer of the State of Louisiana to the Amended Complaint, Par. IX, pp. 6-7. Mississippi has made a similar allegation. Separate Answer of the State of Mississippi to Amended Complaint, Par. VII, pp. 6-7. Those answers are not responsive to the Government's allegation. It is perfectly true that the United States claims control over the resources of the seabed beyond its maritime boundary, as far as the edge of the continental shelf, and that whether such control is to be exercised by the National Government or by the States is a matter of domestic distribution of powers which does not concern other nations. See the statement of Jack B. Tate, Deputy Legal Adviser of the Department of State, Senate Interior Committee Hearings on S. J. Res. 13, 83d Cong., 1st Sess., 1051, 1066-1067. However, in passing the Submerged Lands Act Congress determined not to give the States any rights outside their actual boundaries, even though it could have given them more if it chose. Since State boundaries are the limit selected by Congress, and since State boundaries obviously cannot exceed the national boundary, the national boundary policy is directly material to the determination of the maximum extent of the grant made by Congress.[41] Thus, while foreign nations are

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[41] Louisiana has alleged that its southern boundary has always *necessarily* been coextensive with the southern boundary of the United States. Answer of the State of Louisiana [to original complaint], First Defense, Par. V, p. 7. The allegation is unsound. There is no reason why a State cannot have a more restricted seaward boundary than does the United States. For example, in *United States* v. *California*, 332 U.S. 19, 23, the Court took note of the fact that the federal boundary claim of three *nautical* miles extended seaward .45 of an English mile beyond the boundary of

not concerned with the outcome of the actual controversy between the United States and the States, the considerations that will enter into its decision, in view of the terms of the Submerged Lands Act, necessarily involve matters pertaining to foreign affairs. It is in this way that the nation's foreign policy is involved in the decision of the case.

This does not mean, of course, that the Court is being asked to form foreign policy. It is being asked to take judicial notice of the policy formulated by the political branches of the Government, as disclosed by official communications and actions, and to accept it as the basis for decision of this domestic controversy. This is the usual way of dealing with similar situations, as we have already shown (*supra*, pp. 127-145).[42]

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the State of California, established by its constitution at three *English* miles from the shore. And the original Atlantic Coast States did not all include a three-mile belt within their boundaries (see Brief for the United States In Support of Motion for Judgment, *United States* v. *California*, Oct. Term, 1946, No. 12 Orig., pp. 93, *et seq.*). The Submerged Lands Act recognized that, by 1953, some States might not yet have extended their boundaries to the three-mile limit, by providing that all states might do so and approving such an extension.

[42] Louisiana argues that the political branches of the Government can declare the extent of our national boundaries as between the United States and other nations, but that as between the United States and a State, boundary is a judicial question. Reply of the State of Louisiana to Brief of the United States on Motion for Judgment [on original complaint], pp. 33-35. However, the question of whether a boundary location is for political or judicial determination depends on whether the boundary is internal or external, not on the identity of the parties to the particular litigation in which the question arises. In fact, no foreign sovereign was a party to any of the cases cited, in which this Court has held itself bound to accept the Government's political determination of the territorial extent of this nation's jurisdiction (*supra*, pp. 142-145). Since the rule arises from the practical necessity for maintaining consistency between the nation's international position and domestic

Louisiana denies that the United States has adopted any foreign policy which affects the State boundary as fixed by the Act admitting that State to the Union, and denies that any inquiry into the application of foreign policy can affect or diminish the grant made to the State by the Submerged Lands Act. Answer of the State of Louisiana to the Amended Complaint, Par. X, p. 7. Similarly, Florida alleges that rules of international law do not invalidate the grant made by the Submerged Lands Act. Defenses [of Florida] to Amended Complaint, Fifth Defense, p. 7. This misconstrues the problem, in that it assumes that the State boundary and the congressional grant had fixed limits, more than three miles from the coast, which the United States now seeks to impair by extrinsic considerations of foreign policy. The situation is quite otherwise. Our true position is that the national policy, already established before any of the defendant States entered the Union, limited the national boundary to three miles from the coast, and that the State boundaries, by which Congress chose to define the grant made by the Submerged Lands Act, are necessarily limited by the national boundary. We deny (*infra*, pp. 152-317) that any of the defendant States has valid reasons for claiming that as to it the United States made an exception to its general three-mile limit. Thus, we look to foreign policy, not to defeat in part a broad grant, but rather to identify the limits by which that grant was defined. To do so is not only proper but necessary. The intent

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adjudications, it is obviously of equal importance regardless of who are the parties to the litigation. If a judgment at variance with the nation's foreign policy were to have any effect—and there could be no reason for entering it if it were not—it would necessarily result in judicial revision of that foreign policy, which this Court has always properly eschewed.

of Congress will be promoted, not defeated, by making accurate identification, in the light of all relevant factors, of the limits which Congress named in the Submerged Lands Act.

The foregoing discussion establishes as a matter of law that the United States is entitled to all rights in the adjacent continental shelf in the bed of the Gulf of Mexico except where it has granted those rights to the States; that its only grant to the States has been by the Submerged Lands Act and is, by its express terms, confined to the area within the boundaries of the States; that the State boundaries cannot lie farther seaward than the national boundary; that the national boundary has been authoritatively determined to have been limited to a maximum distance of three geographic miles from the low-water mark and from the outer limit of inland waters; and that from this it follows that the United States is entitled to all rights in its continental shelf in the Gulf of Mexico more than three miles from the low-water mark and from the outer limit of inland waters, unless Congress approved (before the enactment of the Submerged Lands Act) a greater boundary for any of the defendant States. We shall proceed in the following sections of this brief to show that the opposing contentions of the defendants—including the arguments that Congress has approved such greater boundaries—are unsound and cannot prevail against the position we have set forth in this Point I.

II

THE ANSWER OF THE STATE OF LOUISIANA TO THE AMENDED COMPLAINT RAISES NO GENUINE ISSUE AS TO ANY MATERIAL FACT, AND IS INSUFFICIENT IN LAW

Although the allegations of the amended complaint against the State of Louisiana are the same as the allegations of the original complaint, the State has filed a new and different answer in addition to its former answer which is incorporated by reference.[43] In the 1956 Term, on the Government's motion for judgment on the original complaint, we presented our argument with respect to the issues that were raised by Louisiana's answer to the original complaint (Brief for the United States in Support of Motion for Judgment) and by the Brief of the State of Louisiana in Opposition to Motion for Judgment (Brief for the United States in Reply to Louisiana's Opposition to Motion for Judgment, etc.). We had no opportunity to respond in writing to the Reply of the State of

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[43] Answer of the State of Louisiana to the Amended Complaint, Par. XII, p. 12. The presence of these two answers makes it difficult to anticipate Louisiana's arguments. For example, in the original answer, Louisiana asserted a claim to a boundary extending out to the twenty-seventh parallel, basing this claim on a proclamation by La Salle and on the Treaty of Paris (Answer of the State of Louisiana [to original complaint], Second Defense, pp. 13-17). In its present answer, Louisiana appears to limit its claim to three leagues (Answer of the State of Louisiana to the Amended Complaint, Pars. V, XI, pp. 4-5, 8-12) but asserts that France and Spain claimed more than three leagues and adopts by reference the argument in its prior brief as well as the provisions in its prior answer (Answer of the State of Louisiana to the Amended Complaint, Par. XI (B), p. 9). Because of that specific adoption of the former argument, we deal with it below, pp. 153-178.

Louisiana to Brief of the United States on Motion for Judgment, but dealt with it in oral argument.

In this brief we shall deal with the defenses pleaded at length in Louisiana's answer to the amended complaint, and with Louisiana's arguments as presented in its prior briefs insofar as they are pertinent to those defenses. In doing this we shall repeat arguments made in our previous briefs, because it seems convenient that the Court should have a single opening brief from the Federal Government covering all the issues currently before it.[44] We do not now repeat arguments addressed to defenses which the present answer merely incorporates by a general reference and which are not material to the defenses now pleaded at length in the State's present answer.

A. LOUISIANA HAS NEVER HAD A BOUNDARY EXTENDING MORE THAN THREE GEOGRAPHIC MILES INTO THE GULF OF MEXICO

Louisiana bases its claim to more than three miles in part on the ground that Louisiana, as originally claimed for France by La Salle, extended into the Gulf of Mexico to the 27th parallel (about 120 miles south of the southernmost islands or shore of Louisiana); that the same extent into the Gulf was continuously claimed by France and successively transferred to Spain, back to France, and to the United States; and that the Organic Act for the Territory of Orleans, the Louisiana Enabling Act, and the Act admitting the State of Louisiana to the Union likewise embraced the Gulf of Mexico to the 27th parallel, or at least to a distance of three leagues from the coast.

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[44] In some instances, we shall refer to our original briefs (when Louisiana was the sole defendant) for more detailed discussion.

Answer of the State of Louisiana to the Amended Complaint, Par. XI, pp. 9-10; Answer of the State of Louisiana [to original complaint], Second Defense, pp. 13-17. The claim is historically and legally unsound in all of its points.

1. NEITHER FRANCE NOR SPAIN CLAIMED OR ACQUIRED TERRITORIAL JURISDICTION SEAWARD OF THE SHORE OF LOUISIANA

It is apparent from La Salle's proclamation of April 9, 1682, that it was the mouth of the Mississippi which defined the limit of his claim. His expression of the mistaken belief that the river mouth, which he had visited just before issuing the proclamation, was at "about" the 27th parallel did not show any intention to claim to that parallel, however far out in the Gulf it might actually be. His claim was that

> I * * * have taken and do take possession * * * of this country of Louisiana, seas, harbors, ports, bays, adjacent straits and all the nations, peoples, provinces, cities, towns, villages, mines, minerals, fisheries, rivers, streams, comprehended in the extent of the said Louisiana, from the mouth of the great river Saint Louis on the east side, otherwise called Ohio, Olighinsipou or Chukagoua, and this with the consent of the Chaouesnons, Chicachas and other peoples living there with whom we have made alliance, as also along the river Colbert, or Mississippi, and streams which discharge therein, from its source beyond the country of the Sioux or of the Nadouesioux, and this with their consent and of the Ototantas, Illinois, Matsigamea, Arkansas, Natchez, Koroas, who are the most important nations that live there, with whom we

have made alliance in person or through people in our behalf, as far as its mouth in the sea or gulf of Mexico, about 27 degrees of the elevation of the north pole as far as the mouth of the Palms, on the assurance that we have had from all these nations that we are the first Europeans who have descended or ascended the said river Colbert.[45]

The *procès-verbal,* or official report, of Jacques de la Métairie, notary of the La Salle expedition, shows that the proclamation was issued after the mouth of the Mississippi had been reached and the party had returned upstream only far enough to find solid ground for the erection of a monument, and that La Salle then thought that they were at about the 27th parallel:

We continued the navigation until the 6th [of April, 1682], when we arrived at three channels

[45] "* * * Je * * * ay pris et prends possession * * * de ce pays de la Louisiane, mers, havres, ports, bayes, destroits adjacents et toutes les nations, peuples, provinces, villes, bourgs, villages, mines, minières, pesches, fleuves, rivières, compris dans l'estendue de ladite Louisiane, depuis l'emboucheure du grand fleuve Saint-Louis, du costé de l'est, appelé autrement Ohio, Olighinsipou ou Chukagoua, et ce du consentement des Chaouesnons, Chicachas et autres peuples y demeurant avec qui nous avons fait alliance, comme aussy le long du fleuve Colbert, ou Mississipi, et rivières qui s'y deschargent, depuis sa naissance au delà du pays des Sioux ou des Nadouesioux, et ce de leur consentement et des Ototantas, Islinois, Matsigamea, Akansas, Natchez, Koroas, qui sont les plus considérables nations qui y demeurent, avec qui nous avons fait alliance par nous ou gens de nostre part, jusqu'à son embouchure dans la mer ou golfe de Mexique, environs les 27 degrez d'élévation du pôle septentrional jusques à l'emboucheure des Palmes, sur l'asseurance que nous avons eue de toutes ces nations que nous sommes les premiers Européens qui ayent descendu ou remonté ledit fleuve Colbert." 2 Margry, *Découvertes et Établissements des Français dans L'Ouest et dans le Sud de L'Amérique Septentrionale* (1877) 191-192.

by which the river Colbert discharges in the sea. We camped on the bank of the western channel, at three leagues or thereabouts from the mouth. On the 7th, M. de La Salle went to explore it and visit the shores of the neighboring sea, and M. de Tonty the large central channel. These two mouths having been found fine, wide and deep, on the 8th we reascended a little above the confluence to find a dry place that was not overflowed. At about 27 degrees of the elevation of the pole, were prepared a column and a cross * * *.[46]

The proclamation was uttered, with appropriate solemnities, at that point. Clearly, La Salle intended to claim to the mouth of the river, he erected the monument as near thereto as he could find solid ground for the purpose, and he believed that he was then at about the 27th degree of latitude.

The proclamation and *procès-verbal* are not the only evidences of La Salle's error, nor was that the only time that he mistook a latitude. In a letter written at another time, he referred to the final reach of the Mississippi as running "to the East or at most to the South-East, taking this course at least one hundred twenty leagues, from the 30th *as far as the 27th*

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[46] "On continua la navigation jusques au 6e, qu'on arriva aux trois canaux par lesquels le fleuve Colbert se descharge dans la mer. On campa sur le bord du canal occidental, à trois lieues ou environ de l'emboucheure. Le 7e, M. de La Salle le fut reconnoistre et visiter les costes de la mer voisine, et M. de Tonty le grand canal du milieu. Ces deux emboucheures s'estant trouvées belles, larges et profondes, le 8e on remonta un peu au-dessus du confluent pour trouver un lieu sec et qui ne fust point inondé. Environ à 27 dégrez d'élévation du pôle, on fit préparer une colonne et une croix * * *." 2 Margry, *op. cit.* 186, 190-191.

degree, where it discharges into the sea * * *."[47] (Emphasis added.)

In the same letter, he spoke of two Indian villages where he had stopped on the Mississippi, "one situated at 28 degrees or thereabouts of north latitude, and the other at 30 degrees * * *."[48] The 28th parallel is about 60 nautical miles in the Gulf south of the southernmost mouth of the Mississippi.

Earlier in the same letter, describing the area near the mouth of the Ohio river, La Salle said:

> The Chucagoa * * * is the river that we call the river Saint-Louis. The Ohio river is one of its branches, which receives two others of considerable size before falling into the Saint-Louis river * * *. The Takahagane live on the north bank of the Chucagoa, about 32 degrees of north latitude; the Cicaca in the lands about 30 degrees and a half to the south of the same river, almost north and south of the mouth of the river of the Illinois in the Colbert river * * *."[49]

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[47] "* * * à l'Est ou au plus au Sud-Est, faisant cette route au moins cent vingt lieues, depuis le 30e jusqu'au 27e degré, où il se descharge dans la mer * * *." 2 Margry, *Découvertes et Établissements des Français dans L'Ouest et dans le Sud de L'Amérique Septentrionale* (1877) 199.

[48] "* * * l'un situé à 28 degrez ou environ de latitude nord, et l'autre à 30 degrez * * *." *Ibid.*, 198.

[49] "Le Chucagoa * * * est le fleuve que nous appelons le fleuve Saint-Louis. La rivière Ohio est une de ses branches, qui en reçoit deux autres bien considérables avant que de tomber dans le fleuve Saint-Louis * * *. Les Takahagane habitent sur le bord septentrional du Chucagoa, environ les 32 degrez de latitude septentrionale; les Cicaca dans les terres, à environ 30 degrez et demy au sud de ce mesme fleuve, presque nord et sud de

Without attempting to identify precisely the location referred to, we can see, from the fact that the Ohio actually enters the Mississippi (Colbert) at the 37th parallel, that La Salle was substantially in error regarding latitude.

Thirty years after La Salle's proclamation, on September 14, 1712, Louis XIV granted to his secretary, Antoine de Crozat, letters patent for exclusive trading rights in Louisiana. That grant described Louisiana as beginning *at the shore of the sea.* It provided, in the last paragraph of its preamble and in its first article:

> * * * We have by these Presents signed by our hand, established & do establish the said Sieur Crozat to conduct alone the commerce in all the Lands possessed by Us & bounded by new Mexico, & by those of the English of Carolina all the establishments, Ports, Harbors, Rivers & principally the Port & Harbor of Dauphine Island formerly called Massacre, the River Saint Louis formerly called Mississipy, *from the shore of the Sea* as far as the Illinois, together with the Rivers saint Philippe formerly called the Missourys, & saint Hierosme formerly called Ovabache with all the Countries Regions, Lakes in the Lands & the Rivers which fall directly or indirectly into this part of the River Saint Louis.

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l'emboucheure de la rivière des Ilinois, dans le fleuve Colbert * * *." *Ibid.*, 196.

The French nomenclature for these confluent rivers was not uniform. Sometimes, the name Saint-Louis was applied to the Ohio as far as the Mississippi, but at other times the Saint-Louis was said to flow into the Illinois which in turn emptied into the Mississippi. See, *e.g.*, Father Zenobe's letter of June 3, 1682, *ibid.*, 206.

First Article

> We will that all the said Lands, Regions, Rivers, Streams & Islands be and remain comprised under the name of the government of Louisiana, which shall be dependent on the general government of new France, to which it shall remain subordinate * * *.[50]

Here we see the king giving a comprehensive definition of the area to be included in the province of Louisiana, and describing it as beginning at the seashore. He did not consider that the province extended any distance whatever into the Gulf of Mexico.

When France transferred Louisiana to Spain by the secret treaty of November 3, 1762, the cession was described only as "all the country known under the name of Louisiana, as well as New Orleans and the island in which that place stands." See 13 Cong. Deb. (24th Cong., 2nd Sess.) Pt. 2, App., 226 . However,

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[50] Emphasis added. This is a translation of the French text (from a copy in the Henry E. Huntington Library, San Marino, California) as separately printed at Paris, in 1712, by Muguet, Chief Printer to the King and Parlement ("Letters Patentes du Roy, Qui permettent au Sieur Crozat Secretaire du Roy, de faire seul le Commerce dans toutes les Terres possedées par le Roy, & bornées par le nouveau Mexique & autres. * * * A Paris, Chez la Veuve François Muguet & Hubert Muguet, Premier Imprimeur du Roy & de son Parlement, ruë de la Harpe, aux trois Rois. 1712."):

> * * * Nous avons par ces Presentes signées de nostre main, établi & établissons ledit Sieur Crozat pour faire seul le commerce dans toutes les Terres par Nous possedées & bornées par le nouveau Mexique, & par celles des Anglois de la Caroline tous les établissemens, Ports, Havres, Rivieres & principalement le Port & Havre de l'Isle Dauphine appellée autrefois de Massacre, le Fleuve Saint Loüis autrefois appellé Mississipy depuis le bord de la Mer jusq' aux Illinois, ensemble les Rivieres saint Philippe autrefois appellée des Missourys, & saint Hierosme autrefois appellée Ovabache avec tous les Pays

by the Seventh Article of the treaty between France, Spain and Great Britain, executed at Paris on February 10, 1763, it was agreed that

> for the future, the confines between the dominions of his Britannic majesty, and those of his most Christian [*i. e.*, French] majesty, in that part of the world, shall be fixed irrevocably by a line drawn along the middle of the river Mississippi, from its source to the river Iberville, and from thence, by a line drawn along the middle of this river, and the lakes Maurepas and Pontchartrain, *to the sea*; and for this purpose, the most Christian king cedes in full right, and guaranties to his Britannic majesty, the river and port of the Mobile,

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Contrées, Lacs dans les Terres & les Rivieres qui tombent directement ou indirectement dans cette partie du Fleuve Saint Loüis.

Article Premier

Voulons que toutes lesdites Terres, Contrées, Fleuves, Rivieres & Isles soient & demeurent compris sous le nom du gouvernement de la Loüisiane, qui sera dépendent du gouvernement general de la nouvelle France, auquel il demeurera subordonné * * *.

There was another French edition of the letters patent, printed at Paris, "Chez la Veuve Saugrain & Pierre Prault, à l'entrée du Quay de Gêvres, du côté de Pont au Change, au Paradis," undated but apparently of about the same period, which differs from the foregoing in that, in lieu of "depuis le bord de la Mer" (from the shore of the Sea) it reads, "depuis le port de la Mer"—that is to say, "from the seaport." However, "bord de la Mer" seems to have been generally accepted as the correct text. It was followed in the *Recueil d' Arrests* (Amsterdam, 1720), 1, 3, and has been used by translators. See, *e.g.*, Hermann, *The Louisiana Purchase* (G. P. O. 1898), 15 ("from the edge of the sea"); Greenhow, *Memoir, Historical and Political, on the Northwest Coast of North America* (S. Doc. No. 174, 26th Cong., 1st Sess., 1840), 150 ("from the seacoast"). But even the alternative version, "from the seaport", clearly would have referred to a coastal starting point and not one any distance out in the Gulf of Mexico.

> and every thing which he possesses, or ought to possess, on the left side of the river Mississippi, except the town of New Orleans, and the island in which it is situated, which shall remain to France * * *. [Emphasis added.]

15 *Parliamentary History of England,* 1291, 1296. This conformed to the sixth article of a preliminary convention executed by the same powers at Fontainebleau on November 3, 1762, the date of the secret cession of Louisiana to Spain. *Ibid.,* 1241, 1244. See 13 Cong. Deb. (24th Cong., 2d Sess.) Pt. 2, App., 227. Whatever one may think of the degree of candor shown by his Most Christian Majesty and his Most Catholic Majesty in thus describing as property of the former what had already been secretly transferred to the latter, the fact remains that the three European powers interested in North America here joined in defining the eastern limit of Louisiana as terminating at the sea.

Louisiana has also alleged that a Spanish claim to the Gulf of Mexico as far as the 27th parallel was recognized by Britain in the Escurial Treaty of October 28, 1790, by mutual agreement "to boundaries, both in North and South America, extending ten leagues seaward into the Pacific Ocean and the South Seas, which latter seas included the Gulf of Mexico." Answer of the State of Louisiana [to original complaint], pp. 14-15. The allegation is fallacious in every particular.

Since the 27th parallel is 40 leagues or more from the coast of Louisiana, it does not appear how a claim to that distance would be "recognized" by an agreement for boundaries extending 10 leagues seaward. More importantly, the treaty referred to was not a

recognition of maritime boundaries at all; it was merely an agreement that, to prevent smuggling, British ships would not approach within 10 leagues of Spanish settlements. The relevant provisions were:

> III. And in order to strengthen the bonds of friendship, and to preserve in future a perfect harmony and good understanding between the 2 Contracting Parties, it is agreed that their respective Subjects shall not be disturbed or molested either in navigating or carrying on their Fisheries in the Pacific Ocean, or in the South Seas, or in landing on the Coasts of those Seas, in places not already occupied, for the purpose of carrying on their commerce with the Natives of the Country, or of making Settlements there; the whole subject, nevertheless, to the restrictions and provisions specified in the 3 following Articles.
>
> IV. His Britannic Majesty engages to take the most effectual measures to prevent the Navigation and Fishery of his Subjects in the Pacific Ocean, or in the South Seas, from being made a pretext for illicit trade with the Spanish Settlements; and, with this view, it is moreover expressly stipulated, that British Subjects shall not navigate, or carry on their Fishery in the said Seas, within the space of 10 sea leagues from any part of the Coasts already occupied by Spain.[51]

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[51] Translation appearing in *British and Foreign State Papers. 1812-1814* (London, 1841) Vol. I, Part I, 663, 665-666. The parallel official French text also appears there, as follows:

> III. Et, afin de resserer les liens de l'amitié, et de conserver à l'avenir une parfaite harmonie et bonne intelligence entre les 2 Parties Contractantes, il est convenu que les Sujets respectifs

Moreover, the agreement was confined to the Pacific Ocean and the South Seas. Louisiana's allegation (Answer of the State of Louisiana [to original complaint], p. 15), that the South Seas included the Gulf of Mexico, is wholly unsupportable. The term South Sea or South Seas referred to the Pacific Ocean, particularly the South Pacific, or sometimes to the waters of the southern hemisphere:

> South Sea. Name given to the Pacific by its discoverer, Vasco Nunez de Balboa (1513). As the Isthmus of Panama, where he crossed it, runs nearly east and west, the Pacific forms its southern shore: hence, to the Spaniards on the Isthmus it was the South Sea. Until the 19th century this was the common name, sometimes employed in a special manner for the South Pacific. It is still occasionally used. [3 *Century Cyclopedia of Names* (1954) 3666.]

> South sea, *n.* [Sp., *el Mar del Sur.*] 1. The Pacific Ocean;—so called when discovered in 1513 by

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ne seront point troublés ni molestés, soit en naviguant ou en exerçant leur Pêche dans l'Océan Pacifique, ou dans les Mers du Sud, soit en débarquant sur les Côtes qui bordent ces Mers, dans des endroits non déjà occupés, afin d'y exercer leur commerce avec les Naturels du Pays, ou pour y former des Etablissemens. Le tout sujet néanmoins aux restrictions et aux provisions qui seront spécifiées dans les 3 Articles suivans.

IV. Sa Majesté Britannique s'engage d'employer les mesures les plus efficaces pour que la Navigation et la Pêche de ses Sujets dans l'Océan Pacifique, ou dans les Mers du Sud, ne deviennent point le prétexte d'un commerce illicite avec les Etablissemens Espagnols; et, dans cette vûe, il est en outre expressément stipulé, que les Sujets Britanniques ne navigueront point, et n'exerceront pas leur Pêche dans les dites Mers, à la distance de 10 lieues maritimes d'aucune partie des Côtes déjà occupées par l'Espagne.

Vasco Nunez de Balboa, Spanish governor of Darien, who first beheld it when looking south.

2. *pl.* The seas of the Southern Hemisphere; esp., the south Pacific Ocean. [*Webster's New International Dictionary* (2d ed., unabridged, 1956) 2406.]

South Sea. A name formerly applied to the Pacific Ocean and the China Sea. [21 *New International Encyclopaedia* (1930) 326.]

South Sea, name formerly given to the Pacific Ocean. [*Macmillan's Modern Dictionary* (1938) 1152.]

South Sea; *Span. El Mar del Sur* * * *. The Pacific Ocean—so named by Balboa on his discovery of it in 1513. In the plural, South Seas, the waters of the Southern Hemisphere, esp. the South Pacific Ocean. [*Webster's Geographical Dictionary* (1949) 1070.]

South Sea, a name formerly applied to the Pacific Ocean. * * * [*Lippincott's Gazetteer of the World* (Heilprin ed., 1922) 1740.]

We find only one reference work, *Murray's New English Dictionary* (1919), recognizing additional applications for the term, and they are plainly irrelevant here (the dagger marks obsolete usages):

South Sea * * *.

† 1.a. The sea to the south of Europe; the Mediterranean. *Obs.*

† b. The English Channel. *Obs.*

2. *pl.* The seas of the southern hemisphere; *esp.* the South Pacific Ocean.

3. The South Pacific Ocean; † the Pacific Ocean as a whole (obs.). [*Op. cit.*, vol. 9, Pt. 1, p. 485.]

The Gulf of Mexico is no part of the Pacific Ocean. It and indeed the entire Caribbean Sea lie well north of the Equator. The area here under discussion lies north of the 27th parallel, and so is removed from the Equator by 27 degrees, or 1620 nautical miles. It could not possibly be considered water of the Southern Hemisphere. It follows that it was not within the scope of the provision of the Escurial Treaty.

It is very natural that we thus find no intention, up to this point, to make a territorial claim in the Gulf of Mexico, for, as this Court has observed in the case where the whole subject of the marginal sea was given most exhaustive consideration, the concept of territorial ownership of the marginal sea did not arise in international law until after the time when this country achieved its independence. *United States* v. *California*, 332 U. S. 19, 32-33.

By Article 3 of the Treaty of San Ildefonso, October 1, 1800, Spain retroceded to France

> the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it should be after the treaties subsequently entered into between Spain and other states.[52]

The Treaty of April 30, 1803, by which France ceded Louisiana to the United States, recited the foregoing

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[52] "* * * la Colonie ou Province de la Louisiane, avec la même étendue qu'elle a actuellement entre les mains de l'Espagne, et qu'elle avoit lorsque la France la possédoit, et telle qu'elle doit être d'après les traités passés subséquemment entre l'Espagne et d'autres Etats." See 8 Stat. 202, 203.

terms of the Treaty of San Ildefonso, and provided (8 Stat. 202):

> The First Consul of the French Republic * * * doth hereby cede to the said United States * * * the said territory with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French Republic, in virtue of the above-mentioned treaty, concluded with his Catholic Majesty.
>
> Art. II. In the cession made by the preceding article are included the *adjacent islands* belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private property. * * * [Emphasis added.]

The specific reference to islands, in Article II, would have been unnecessary if the cession had extended to the 27th parallel, which is 120 miles south of all islands. It plainly shows that the parties, with their attention particularly directed to the question of the Gulf of Mexico, regarded the cession as including the islands therein and nothing more.[58]

Thereafter, the United States engaged in a long dispute with Spain over the eastern and western limits of Louisiana as so ceded. The Spanish views as to the southern limit, although it was not in issue, also appear

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[58] Louisiana asserts that the reference to islands in Article II of the Louisiana cession, quoted above, "gave emphasis to the acquisition of the marine area." Answer of the State of Louisiana to the Amended Complaint, Par. XI (C), p. 9. In fact, this provision makes it perfectly clear that the marine area now claimed by the State was not included within the perimeter of "Louisiana" as understood by the parties, for if it had been the islands would have been *within* it rather than "adjacent."

incidentally from that correspondence. Thus, Pedro Cevallos, the Spanish Foreign Minister, writing on April 13, 1805, to Charles Pinckney and James Monroe, the American Envoys, said (*American State Papers*, 2 Foreign Relations 662):

> It follows, therefore, that the boundary between the provinces of Texas and Louisiana ought to be by a line which, *beginning at the Gulf of Mexico*, between the river Caricut, or Cascassia, and the Armenta, or Marmentoa, should go to the north * * *. [Emphasis added.] [54]

Luis de Onis, the Spanish Ambassador, writing to John Quincy Adams, Secretary of State, on December 29, 1817, said with respect to the situation existing at the time of the Treaty of San Ildefonso (*American State Papers*, 4 Foreign Relations 453):

> At that time Louisiana was, in the hands of Spain, precisely what it was when ceded by France, in

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[54] Louisiana has made reference to a Spanish protest, January 16, 1817, against seizure by pirates of a Spanish ship "within sight of the Balize" on the Mississippi, "manifestly in violation of the territory of the United States." Reply of the State of Louisiana to Brief of the United States on Motion for Judgment [on original complaint], p. 64. The purpose of that reference is not explained, but as Louisiana states that the Balize was at the mouth of the Mississippi, it may be intended to imply that waters within sight of the coast were territorial. However, no such inference can properly be drawn from the episode. Some years prior to that time, the Balize had been removed to a point about a mile up the river from its mouth. Describing a voyage to New Orleans, Benjamin H. B. Latrobe wrote in his journal under date of January 5, 1819:

> After passing the bar, the water assumes the character of a river, bounded on each side by a margin of reeds apparently growing in the water, among which low shrubs & willows 15 to 20 feet high form higher tufts; a mile from this mouth of the river lies the Balize * * *. [Latrobe, *Impressions Respecting*

> virtue of the treaty of 1764. In the same treaty its eastern boundaries are marked by a line running eastward from Manchac Point, thence following the course of the river Iberville, and dividing the lakes Borgne, Pontchartrain, and Maurepas, and *finally terminating at the Gulf of Mexico,* without leaving the smallest doubt as to the true points of the frontier. [Emphasis added.]

Writing again to Secretary Adams on March 23, 1818, de Onis said (*American State Papers,* 4 Foreign Relations 484):

> That which has been said by Don Pedro Cevallos and by me, and which can admit of no doubt, is, that the western boundaries of Louisiana have always been notorious and acknowledged between Spain and France; *from the ocean* by a line drawn between the rivers Mermento and Calcasia, run-

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New Orleans: Diary & Sketches, 1818-1820 (Wilson ed., 1951), 13.]

Regarding the Balize, Samuel Wilson, editor of Latrobe's journal, notes:

> The Balize (Buoy or Beacon) at the mouth of the Mississippi River was first established by Adrien de Pauger, French engineer, in the spring of 1721. It was located on a small island at the entrance to the southeast pass, and a considerable settlement developed, which had to be abandoned near the end of the French régime, due to sinking of the island. It was re-established farther up the pass, at its junction with the northeast pass. [*Op. cit.*, 12, fn. 5.]

Indeed, the Spanish protest explained, in a portion not quoted by Louisiana, that the vessel in question had been "at anchor in the Pass of the Mississippi." Letter of January 16, 1817, from Luis de Onis, the Spanish Ambassador, to James Monroe, Secretary of State, *American State Papers,* 4 Foreign Relations 186. In any event, Spain's opinion as to the extent of American territorial waters seems of no importance here.

ning by Arroyo Hondo, between the Adaes and Natchitoches, crossing the Rio Roxo, (Red River,) and ascending towards the north. [Emphasis added.]

As the foregoing shows, both France and Spain always regarded Louisiana as being bounded on the south by the Gulf of Mexico, and not as extending any distance therein. Thus, there is no foundation for any contention that the United States acquired from France an area extending into the Gulf to the 27th parallel, or any other distance.

Even if France and Spain had claimed to the 27th parallel and Britain had recognized that claim, those circumstances would be entirely unavailing to Louisiana here. As we have shown (*supra*, pp. 140-147), the extent of the territory subject to the jurisdiction of a foreign nation is a political question and a decision reached on that subject by the political branches of a government is binding upon the courts of that government. That rule was announced by this Court long ago, in a case involving the precise question of the extent of the territory of Louisiana as acquired by the United States from France. *Foster* v. *Neilson*, 2 Pet. 253. The issue there was whether the Louisiana Purchase was bounded on the east by the Iberville river,[55] or extended east to the Perdido river (the present western boundary of Florida). That depended, in turn, on whether the area between the two rivers was included in the retrocession of Louisiana to France by Spain, by the Treaty of San Ildefonso. At issue was the valid-

[55] Now called Bayou Manchac. See *Louisiana* v. *Mississippi*, 202 U. S. 1, 37; Adams, *Atlas of American History* (1943), plates 49 and 50.

ity of land grants made by Spain in the area between 1803, the date of the Louisiana Purchase, and 1819 when the United States acquired Florida from Spain. Both Spain and France asserted that the disputed area had not been transferred to France by the Treaty of San Ildefonso; but the President and Congress took a different view, and this Court held that it was bound to conform to their decision.

Chief Justice Marshall, speaking for the Court, said (2 Pet. at 307):

> In a controversy between two nations, concerning national boundary, it is scarcely possible, that the courts of either should refuse to abide by the measures adopted by its own government. * * * The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is, to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. We think, then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed.

We have shown (*supra*, pp. 59-101) that the Government of the United States, acting through the Executive as that branch of the Government charged with foreign affairs, consistently refused to recognize that any nation can possess a belt of territorial waters

wider than three nautical miles. The courts of the United States are bound to accept that view. Here, then, it must be held that neither France nor Spain had a marginal belt wider than three miles along the coast of Louisiana, and that the United States consequently could not have received, and did not receive, from France a boundary more than three miles from the coast, at the most.

2. THE TERRITORY OF ORLEANS DID NOT HAVE A BOUNDARY MORE THAN THREE MILES FROM THE COAST

The Territory of Orleans, the immediate predecessor of the State of Louisiana, had no more extensive a maritime boundary than did the province of Louisiana as the United States acquired it from France. The Territory of Orleans was established by the Organic Act of March 26, 1804, 2 Stat. 283, Appendix A, *infra*, p. 324, which described it as

> That portion of country, ceded by France to the United States, under the name of Louisiana, which lies south of the Mississippi territory, and of an east and west line to commence on the Mississippi river, at the thirty-third degree of north latitude, and to extend west to the western boundary of the said cession * * *.[56]

Thus, the Territory was not to extend beyond the area purchased from France, which as we have shown stopped at the shore. As a territory, Orleans was a

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[56] Louisiana is in error in its allegation that the Organic Act for the Territory of Orleans included the provision for "islands within three leagues of the coast," which afterward appeared in the Louisiana Enabling Act, 2 Stat. 641, and the Act admitting Louisiana to the Union, 2 Stat. 701. Answer of the State of Louisiana to the Amended Complaint, Par. XI (D), p. 10.

mere creature of the National Government. *Talbott* v. *Silver Bow County*, 139 U.S. 438, 446. It had no independent sovereignty or existence and was necessarily limited by the national boundary. The national policy was already settled to claim no more than three miles from the shore (*supra*, pp. 59-64). In any case, the boundary of the Territory prior to statehood would not give the State any rights under the Submerged Lands Act (*supra*, pp. 47-51).

3. THE ACT ADMITTING LOUISIANA TO THE UNION DID NOT DESCRIBE ANY MARGINAL BELT FOR THE STATE, AND CERTAINLY DID NOT ESTABLISH ONE MORE THAN THREE MILES WIDE

The Louisiana Enabling Act provided for the formation of a State to comprise "that part of the territory or country ceded under the name of Louisiana" from France to the United States "contained within the following limits, that is to say: beginning at the mouth of the river Sabine," thence up that river, north, east, southward, and "along the middle of the said [Iberville] river and lakes Maurepas and Ponchartrain, to the gulf of Mexico; thence bounded by the said gulf to the place of beginning; including all islands within three leagues of the coast * * *." Act of February 20, 1811, 2 Stat. 641; Appendix A, *infra*, pp. 324-325. With minor variations in punctuation, the Act of Admission contained the same description. Act of April 8, 1812, 2 Stat. 701; Appendix A, *infra*, pp. 325-326. Louisiana takes the position that its Enabling Act described a belt of water and submerged land extending three leagues from the coast. Answer of the State of Louisiana to the Amended Complaint, Pars. V, XI (D), pp. 4, 10.

It is submitted that there can be no justification for construing the boundary described in the Enabling Act as including three leagues of water and submerged land. On its face, "including all islands within three leagues of the coast" does not appear to mean "including all waters and submerged lands within three leagues of the coast," and similar language in other boundary descriptions has not been so construed. For example, the Treaty of Paris of September 3, 1783, by which Great Britain recognized the independence of the United States, after describing the landward boundary of the United States, from the mouth of the St. Croix river in the Bay of Fundy to the mouth of the St. Mary's river between Georgia and Florida, added (8 Stat. 80, 82):

> comprehending all islands within twenty leagues of any part of the shores of the United States, and lying between lines to be drawn due east from the points where the aforesaid boundaries between Nova-Scotia on the one part, and East-Florida on the other, shall respectively touch the Bay of Fundy and the Atlantic ocean; excepting such islands as now are, or heretofore have been within the limits of the said province of Nova Scotia.

That has never been understood as meaning that the boundary of the United States was a line twenty leagues from shore in the sea; on the contrary, the United States consistently took the position that its boundary in the sea was three nautical miles, or one league, from the shore.[57]

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[57] *Supra*, pp. 59-101.

Similarly, the Treaty of March 18/30, 1867, by which Russia ceded Alaska to the United States, described the ceded area as (15 Stat. 539):

> all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth, to wit: * * *
>
> The western limit within which the territory and dominion conveyed, are contained, passes through a point in Behring's straits * * * and proceeds due north, without limitation, into the same Frozen ocean. The same western limit, beginning at the same initial point, proceeds thence in a course nearly southwest through Behring's straits and Behring's sea, so as to pass midway between the northwest point of the island of St. Lawrence and the southeast point of Cape Choukotski, to the meridian of one hundred and seventy-two west longitude; thence, from the intersection of that meridian, in a southwesterly direction, so as to pass midway between the island of Attou and the Copper island of the Kormandorski couplet or group in the North Pacific ocean, to the meridian of one hundred and ninety-three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian islands east of that meridian.

In the Bering Sea Fur Seal Arbitration between the United States and Great Britain, the United States conceded that the foregoing provisions only served to identify the islands conveyed, and were not a convey-

ance of the water area within the described line. 12 *Fur Seal Arbitration. Proceedings of the Tribunal of Arbitration at Paris, 1893.* Oral Argument for the United States, 107-110. To the same effect was the statement made by Mr Peirce, the American delegate at the arbitration of the whaling and sealing claim of the United States against Russia, held at the Hague in 1902. He there said (*Foreign Relations of the United States,* 1902, Appendix I, 440):

> In the first session the arbitrator asked me, "What is the extent of jurisdiction which the United States claim to-day in Bering Sea?" and I replied that the American Government now claims an extent of 3 miles. I wished that this reply might be sustained by the Secretary of State, Mr. John Hay. I am now in receipt of a dispatch, and in accordance with the authority which I have received from the Secretary of State of the United States, dated July 3, 1902, I repeat that the Government of the United States claims, neither in Bering Sea nor in its other bordering waters, an extent of jurisdiction greater than a marine league from its shores, but bases its claims to jurisdiction upon the following principle: The Government of the United States claims and admits the jurisdiction of any State over its territorial waters only to the extent of a marine league, unless a different rule is fixed by treaty between two States; even then the treaty States alone are affected by the agreement.

Language similar to that of the Louisiana Enabling Act was used in the enabling acts for Mississippi and

Alabama, and there are strong reasons for believing that it was not intended that water or submerged land should be included thereby. The Mississippi Enabling Act, March 1, 1817, 3 Stat. 348, Appendix A, *infra*, pp. 326-327, described the State as "including all the islands within six leagues of the shore"; similarly, the Alabama Enabling Act, March 2, 1819, 3 Stat. 489, 490, Appendix A, *infra*, pp. 328-329, described the State as "including all islands within six leagues of the shore." It would certainly be surprising to find Congress at that late day claiming a marginal belt of *six* leagues, particularly in view of the fact that only a few years before it had limited Louisiana to islands within *three* leagues.

It is submitted there is neither reason nor authority for construing the language of the Louisiana Enabling Act as meaning other than what it says: that islands located within three leagues of the coast are part of the State of Louisiana. The normal meaning of the boundary description, "to the gulf of Mexico; thence bounded by the said gulf to the place of beginning" (*i. e.*, "the mouth of the river Sabine"), seems to be, bounded by the shore of the Gulf. If the State, as so described, was entitled to a marginal belt in the Gulf, that must have resulted not from the terms of the description but from a general national policy to regard such a belt as a normal attribute of a littoral sovereign. Certainly such a belt in any event could not exceed the width of that which the nation claimed for itself; and, as we have shown (*supra*, pp. 59-106), the United States has limited itself to a claim of a marginal belt of not more than three geographic miles. In this view, it is unnecessary to decide whether Louisiana in fact had a marginal belt

when it entered the Union. Since its entry it has made statutory claim to a marginal belt of more than three miles. Louisiana Act 55 of 1938, Louisiana Acts 1938, p. 169; Louisiana Act 33 of 1954, Louisiana Acts 1954, p. 63. Section 4 of the Submerged Lands Act, approving past or future extensions of State boundaries to a distance of three miles from the coast, presumably approves to that extent these broader claims. Consequently, we concede that the State is now entitled under the Submerged Lands Act to the benefit of a three-mile marginal belt, whatever its past situation may have been. 67 Stat. 31, 43 U. S. C., Supp. V, 1312.

While the United States denies that the phrase, "including all islands within three leagues of the coast," described any submerged land, we do agree that Louisiana is entitled, though for a different reason, to the submerged lands between its islands and mainland. It happens that all the islands on the coast of Louisiana are so situated that the waters between them and the mainland are sufficiently enclosed to constitute inland waters; consequently the lands underlying those waters necessarily passed to the State upon its entry into the Union. *Pollard* v. *Hagan*, 3 How. 212. Thus the islands, together with the line marking the outer limit of the intervening inland waters, constitute the "coast" of Louisiana in the sense of the Submerged Lands Act. We make this explanation lest the dispute over the meaning of the Act of Admission should give the impression that the submerged lands within the islands are contested here. We likewise concede the State's right to the submerged lands within three miles seaward of the islands, under

the ordinary three-mile rule. We deny its right to more.

B. THIS COURT HAS NOT HERETOFORE DECIDED THE LOCATION OF LOUISIANA'S GULFWARD BOUNDARY

The Answer of the State of Louisiana to the Amended Complaint alleges, Par. XI (G), p. 11, that the United States is bound by decisions of this Court in *United States* v. *Texas*, 162 U. S. 1, and *Louisiana* v. *Mississippi*, 202 U. S. 1, recognizing that Louisiana's boundary as fixed by its act of admission includes a water area. The United States, of course, has never denied that the boundary of Louisiana includes water areas. It does deny that this Court, either by the cited decisions or otherwise, has adjudicated the width of Louisiana's maritime belt in the Gulf of Mexico.

United States v. *Texas*, 162 U.S. 1, concerned a dispute as to whether the proper boundary between Texas and the Indian Territory followed the North Fork or the Prairie Dog Town Fork of the Red River. In the opinion of the Court there is no mention whatever of the Gulf boundary of Louisiana. *Louisiana* v. *Mississippi*, 202 U.S. 1, involved a dispute between those States as to the location of their common boundary. Even if it had declared the location of Louisiana's gulfward boundary, that decision would not bind the United States as it was not a party to the suit. The fact is, however, that the Court did not decide, but expressly reserved, the question of Louisiana's gulfward boundary. The Court said (202 U.S. at 52):

> Questions as to the breadth of the maritime belt or the extent of the sway of the riparian States

require no special consideration here. The facts render such discussion unnecessary.

See *United States* v. *California*, 332 U.S. 19, 37, where the Court said:

> The second case, *Louisiana* v. *Mississippi*, 202 U.S. 1, 52, uses language about "the sway of the riparian States" over "maritime belts." That was a case involving the boundary between Louisiana and Mississippi. It did not involve any dispute between the federal and state governments. And the Court there specifically laid aside questions concerning "the breadth of the maritime belt or the extent of the sway of the riparian States . . ." *Id.* at 52. * * *

The particular language quoted by Louisana, "ownership of the State of Louisiana in the land and water territory," is from the Court's decree, *Louisiana* v. *Mississippi*, 202 U.S. 58, 59, enjoining Mississippi from disputing "the sovereignty and ownership of the State of Louisiana in the land and water territory south and west of said boundary line as laid down on the foregoing map." The line referred to is described as running "between Cat Island and Isle à Pitre, to the Gulf of Mexico, as delineated on the following map" (202 U.S. 58); the map inserted at that point extends eastwards only to the 89th meridian, and is entirely within inland waters. See Brief for the United States in Support of Motion for Judgment [on original complaint in this case], 128-130. It is evident that the area referred to, comprising the St. Bernard peninsula and the waters north thereof, had nothing to do with the marginal sea in the Gulf of Mexico.

C. LOUISIANA'S EQUAL FOOTING WITH OTHER STATES DOES NOT ENTITLE IT TO SUBMERGED LANDS AND RESOURCES MORE THAN THREE MILES FROM THE COAST

Louisiana alleges that the equal footing with other States, to which it is entitled under the Constitution, requires that its boundary be recognized as being three leagues in the Gulf because the boundaries of other Gulf States are recognized as extending that far. Answer of the State of Louisiana to the Amended Complaint, Par. XI (H), pp. 11-12. There is nothing in the "equal footing" principle which makes the boundaries of other Gulf States in any way pertinent to Louisiana's rights under the Submerged Lands Act.

Ordinarily, the claim to stand on an "equal footing" is that a newly admitted State is entitled to stand on an equal footing with the original States, or with other States already admitted to the Union. Louisiana, however, was the first of the Gulf States to be admitted to the Union, April 8, 1812 (2 Stat. 701).[58] Thus, Louisiana is in the unusual position of asserting a right to stand on an equal footing with States that came after it. We believe it unnecessary to consider what effect this chronology might have on the underlying question of political boundary; but it clearly forecloses reliance on the "equal footing" theory so far as concerns the rights here involved. As we have sev-

[58] Mississippi was admitted December 10, 1817 (3 Stat. 472); Alabama was admitted December 14, 1819 (3 Stat. 608); Texas was admitted December 29, 1845 (9 Stat. 108); Florida was admitted March 3, 1845 (5 Stat. 742), but its chief claim to a three-league boundary in the Gulf rests on Article I of its Constitution of 1868 (Fla. Laws, 1868, pp. 193, 195; 25 Fla. Stats. Anno., pp. 411, 413) and the Act of June 25, 1868, readmitting it to representation in Congress (15 Stat. 73; *infra*, pp. 262-313).

eral times stressed, the question here is the extent of the rights granted by the Submerged Lands Act, and those rights are limited to the State boundary as it existed when the State entered the Union or as afterward approved by Congress. Certainly, when Louisiana entered the Union in 1812 it had no boundary derived from a constitutional right to stand on an equal footing with respect to the particular boundaries to be claimed by future States in years to come. And there is no claim that Congress has since approved any boundary for Louisiana resulting from the more extended claims of Texas and Florida. Even if such a boundary had been accorded to Louisiana by force of its constitutional equality, for purposes of political jurisdiction, it had not the Congressional approval which is prerequisite to its applicability to the grant of mineral rights made by the Submerged Lands Act.

And there certainly can be no valid claim that Congress is *constitutionally* required to make precisely the same grant of federal resources to each and every state. The whole history of congressional grants of federal property—lands, facilities, monies—belies such an argument. The rule has never been that what Congress gives to one state it must give to all.

From what we have said it is evident that, even if other Gulf States had boundaries more than three miles from the coast, "equal footing" would not entitle Louisiana to corresponding benefits under the Submerged Lands Act. We believe, however, that in fact no State has a boundary more than three miles in the Gulf. The particular claims made by the other Gulf States in that respect are discussed *infra*, pp. 187-317. However, Louisiana has advanced, in support of the three-league

claims of Florida and Texas, arguments that have not been made by those States. We shall answer those arguments in this Point, to avoid appearing to impute to those States unsound contentions which they have not made.

Regarding Florida, Louisiana has referred to the case of *The Abby Dodge*, 223 U.S. 166, and to the statute which it construed as recognition by this Court and by Congress that Florida had a boundary three leagues in the Gulf. Reply of the State of Louisiana to Brief of the United States on Motion for Judgment [on original complaint], pp. 54-55. This Court has put a different construction on its decision. In *United States* v. *California*, 332 U.S. 19, 37, the Court said of *The Abby Dodge:*

> This Court construed the statute's prohibition as applying only to sponges outside the state's "territorial limits" in the Gulf. It thus narrowed the scope of the statute because of a belief that the United States was without power to regulate the Florida traffic in sponges obtained from within Florida's territorial limits, *presumably the three-mile belt.* * * * [Emphasis added.]

Regarding Texas, Louisiana alleges that by treaties with Spain, Mexico and the Republic of Texas, and particularly by the Convention of April 25, 1838, 8 Stat. 511, with the Republic of Texas, the United States recognized the boundary of Texas as running three leagues in the Gulf, and established the southeast corner of Texas three leagues in the Gulf. This assertion is demonstrably incorrect.

The Convention of April 25, 1838, to which Louisiana

refers, was a treaty between the United States and the Republic of Texas, recognizing the boundary between them as established by an earlier treaty between the United States and Mexico, and providing for the survey of a part thereof by a joint commission. It provided, in relevant part (8 Stat. 511):

> Whereas the treaty of limits made and concluded on the twelfth day of January, in the year of our Lord one thousand eight hundred and twenty-eight between the United States of America on the one part and the United Mexican States on the other, is binding upon the Republic of Texas, the same having been entered into at a time when Texas formed a part of the said United Mexican States:
>
> * * * * *
>
> Art. 1. Each of the contracting parties shall appoint a commissioner and a surveyor, who shall meet * * * and proceed to run and mark that portion of the said boundary which extends from the mouth of the Sabine, where that river enters the Gulph of Mexico, to the Red river. They shall make out plans and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this convention, and shall have the same force as if it were inserted therein. * * *

Since this convention expressly recognized the binding force of the Treaty of January 12, 1828, between the United States and Mexico, and did not mention the Texan boundary statute of December 19, 1836, 1 Laws Rep. Tex. 133, by which that republic first announced

its three-league claim, it is evident that the 1836 boundary claim was not "specifically recognized" by the 1838 convention, as Louisiana asserts. No such three-league claim was made or recognized by the Treaty of January 12, 1828, to which the 1838 convention referred. It provided, in relevant part (8 Stat. 372-374):

> The limits of the United States of America with the bordering Territories of Mexico having been fixed and designated by a solemn treaty, concluded and signed at Washington, on the twenty-second day of February, in the year of our Lord one thousand eight hundred and nineteen, between the respective Plenipotentiaries of the Government of the United States of America, on the one part, and that of Spain on the other: And whereas, the said treaty having been sanctioned at a period when Mexico constituted a part of the Spanish Monarchy, it is deemed necessary now to confirm the validity of the aforesaid treaty of limits, regarding it as still in force and binding between the United States of America and the United Mexican States:
>
> * * * * *
>
> ARTICLE FIRST
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> The dividing limits of the respective bordering territories of the United States of America and of the United Mexican States, being the same as were agreed and fixed upon by the abovementioned treaty of Washington, concluded and signed on the twenty-second day of February, in the year one thousand eight hundred and nineteen, the two high

contracting parties will proceed forthwith to carry into full effect the third and fourth articles of said treaty, which are herein recited, as follows:

ARTICLE SECOND

The boundary line between the two countries, west of the Mississippi, shall begin on the gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river * * * .

Article 3 of the Treaty of February 22, 1819, between the United States and Spain, 8 Stat. 252, 254-256, described the boundary in the terms quoted in the second article of the Treaty of January 12, 1828, between the United States and Mexico, *supra*. Thus, the three successive boundary treaties between the United States and Spain, Mexico and the Republic of Texas all provided for a boundary beginning "on the gulf of Mexico, at the mouth of the river Sabine, in the sea," and running north along the western bank of that river. Nothing in that language remotely suggests that the corner was established three leagues from shore, as Louisiana alleges. On the contrary, the Journal of the Joint Commission which surveyed part of the boundary pursuant to the Convention of April 25, 1838, *supra*, stated under date of May 21, 1840, " * * * we established the point of beginning of the boundary between the United States and the republic of Texas at a mound on the western bank of the junction of the river Sabine with the sea * * *." S. Doc. No. 199, 27th Cong., 2d Sess., 59. There could not be a more explicit statement that the boundary—not merely the portion then to be

surveyed, but the boundary itself—began on the shore. Under the terms of Article 1 of the 1838 convention, *supra*, this joint statement of the commissioners is to be considered as part of the convention, with the same force as if inserted therein.[59] See also *infra*, pp. 197-206.

D. LOUISIANA'S CLAIM TO MINERAL RIGHTS FOR A DISTANCE OF THREE LEAGUES FROM THE COAST, REGARDLESS OF ITS BOUNDARY LOCATION, IS NOT MAINTAINABLE

Louisiana alleges that it is entitled to the natural resources within a distance of three leagues from its coast, even if its territorial boundary does not extend so far. Answer of the State of Louisiana to the Amended Complaint, Pars. V, X, XI, pp. 4-5, 8-9. The grounds for this contention are not stated, but only three grounds appear possible: that Louisiana has rights in the resources independently of the Submerged Lands Act; that the Act nullified the whole decree in *United States* v. *Louisiana*, 340 U.S. 899; or that the

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[59] Louisiana says that under the boundary convention of April 25, 1838, between the United States and Texas, "the boundary was agreed upon as beginning at the Mouth of the Sabine River three leagues from land and running west along the Gulf three leagues from land to the Mouth of the Rio Grande." Reply of the State of Louisiana to Brief of the United States on Motion for Judgment [on original complaint], p. 45. That language, which is derived from a note in 4 Miller, *Treaties and Other International Acts of the United States* (1934), 135, 136, was part of an instruction of March 21, 1838, from R. A. Irion, the Texan Secretary of State, to Memucan Hunt, the Texan Minister negotiating the treaty, reminding him of the boundary described by the Act of December 19, 1836, 1 Laws Rep. Tex. 133. There is nothing to show that it was ever agreed to by the United States. It did not enter into the survey made by the joint commissioners under the treaty; on the contrary, as we point out above, the commission marked the beginning of the boundary between Texas and the United States at a point on the shore.

Act granted mineral rights beyond State boundaries. None of those propositions is tenable. We have already shown (*supra*, pp. 27-30) that none of the defendant States can have any mineral rights in the bed of the Gulf of Mexico independently of the Submerged Lands Act. That is particularly clear as to Louisiana and Texas, the point having been actually adjudicated by this Court as between the United States and those States. *United States* v. *Louisiana*, 339 U.S. 699, 340 U.S. 899; *United States* v. *Texas*, 339 U.S. 707, 340 U.S. 900. We showed in the Brief for the United States in Support of Motion for Judgment [on original complaint], pp. 82-85, that the Submerged Lands Act was merely a grant to the States of certain rights previously held to belong to the United States (*United States* v. *California*, 332 U.S. 19; *United States* v. *Louisiana*, 339 U.S. 699; *United States* v. *Texas*, 339 U.S. 707) and was not a nullification of the former holdings beyond the extent of the grant, or a nullification of the theory on which those holdings were made. We have also shown (*supra*, pp. 31-47) that the grant made by the Submerged Lands Act did not extend beyond State boundaries. It necessarily follows that Louisiana can have no mineral rights in the bed of the Gulf of Mexico outside its boundaries, either under the Submerged Lands Act or otherwise.

III

THE ANSWER OF THE STATE OF TEXAS TO THE AMENDED COMPLAINT RAISES NO GENUINE ISSUE AS TO ANY MATERIAL FACT, AND IS INSUFFICIENT IN LAW

The answer of the State of Texas to the second cause of action asserts a claim to the submerged lands and resources under the Gulf of Mexico within three

leagues of the coast, on three alternative grounds: (1) that Texas had a three-league boundary prior to or at the time it entered the Union or as approved by Congress before May 22, 1953, entitling it to a grant of that extent under the Submerged Lands Act (Par. IX, pp. 3-4); or (2) that the Submerged Lands Act itself fixed the national and State boundary at three leagues and granted Texas the submerged lands and resources to that distance (Par. X, pp. 4-5); or (3) that the Submerged Lands Act granted Texas the submerged lands and resources to a distance of three leagues regardless of the location of the national or State boundary (Par. XI, p. 5). Texas does not claim any rights in the submerged lands or resources more than three leagues from the coast (Par. VI, pp. 2-3) and does not claim rights in the submerged lands or resources on any basis other than the Submerged Lands Act.

A. THE STATE OF TEXAS IS NOT ENTITLED TO SUBMERGED LANDS AND RESOURCES MEASURED BY THE THREE-LEAGUE BOUNDARY CLAIMED BY THE REPUBLIC OF TEXAS

1. THE REPUBLIC OF TEXAS NEVER EFFECTIVELY ESTABLISHED ITS THREE-LEAGUE CLAIM

There is no doubt, of course, that the Republic of Texas made statutory claim to a marginal belt three leagues wide. The Act to Define the Boundaries of the Republic of Texas, approved December 19, 1836, was explicit on the point. 1 Laws Rep. Tex. 133; Appendix A, *infra*, pp. 340-341. But merely to claim a boundary does not suffice to establish it in fact. If it exceeds the limits ordinarily allowed by international

law, it gains international validity only to the extent that it is recognized by other nations, or is acquiesced in by them over a considerable period after being brought to their attention by actual enforcement or in some other effective way. That point was most clearly asserted by this Government in Secretary of State Seward's letter of August 10, 1863, to Gabriel Tassara, the Spanish minister, rejecting the Spanish claim to six miles of territorial water around Cuba:

> * * * it cannot be admitted, nor indeed is Mr. Tassara understood to claim, that the mere assertion of a sovereign, by an act of legislation, however solemn, can have the effect to establish and fix its external maritime jurisdiction. His right to a jurisdiction of three miles is derived not from his own decree but from the law of nations, and exists even though he may never have proclaimed or asserted it by any decree or declaration whatsoever. He cannot, by a mere decree, extend the limit and fix it at six miles, because, if he could, he could in the same manner, and upon motives of interest, ambition, or even upon caprice, fix it at ten, or twenty, or fifty miles, without the consent or acquiescence of other powers which have a common right with himself in the freedom of all the oceans. Such a pretension could never be successfully or rightfully maintained. The statutes which Mr. Tassara has recited are therefore regarded as showing what certainly is by no means unimportant, that Spain at an early day asserted, and has on different occasions since that time reasserted, in her domestic legislation, a claim to an exceptional jurisdiction of three miles in

addition to the three miles of jurisdiction conceded by the law of nations.

A claim thus asserted and urged must necessarily be now respected and conceded by the United States, if it could be shown that on its being brought to their notice they had acquiesced in it, or that on its being brought to the notice of other powers it had been so widely conceded by them as to imply a general recognition of it by the maritime powers of the world. It is just here, however, that the claim of Spain seems to need support. Nations do not equally study each other's statute books, and are not chargeable with notice of national pretensions resting upon foreign legislation. The undersigned cannot admit that this claim of Spain to a maritime jurisdiction of six miles was recognized or admitted by the United States in the treaty of friendship, amity, and commerce between the United States and Spain which was celebrated in 1795, insomuch as there is no evidence that this peculiar and exceptional claim of maritime jurisdiction was then brought by the one party to the knowledge of the other. * * *

Within the period which has elapsed since the date of the first royal decree asserting the claim to which Mr. Tassara has directed the attention of the undersigned, there have been many and long periods of naval war, but the undersigned has not been given to understand that any maritime power having been made actually acquainted with the claim of Spain to a jurisdiction of six miles around the island of Cuba has acquiesced therein, or recognized the same.

> It results from these remarks, that while it is admitted that on the part of Spain the claim is not one of new creation, it is practically one that has only recently been presented to the United States, and for aught that appears is entirely new to other maritime powers.

1 Moore, *Digest of International Law* (1906), 706 710-711.

It was in recognition of this principle, that mere assertion of jurisdiction does not suffice to establish a right to it, that the Permanent Court of International Justice, in the case of *The Legal Status of Eastern Greenland* (*Denmark* v. *Norway*), said in its judgment of April 5, 1933:

> Before proceeding to consider in detail the evidence submitted to the Court, it may be well to state that a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.

3 Hudson, *World Court Reports* (1932-1935), 170-171.

Similarly, in *The Island of Palmas Case* (*United States* v. *The Netherlands*), the Permanent Court of Arbitration, in its judgment of April 4, 1928, said:

> The growing insistence with which international law, ever since the middle of the 18th century, has demanded that the occupation shall be effective

> would be inconceivable, if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right. If the effectiveness has above all been insisted on in regard to occupation, this is because the question rarely arises in connection with territories in which there is already an established order of things.

Scott, *Hague Court Reports* (Second Series, 1932), 83, 93.

This need for effective control to back up a formal assertion of jurisdiction has been recognized by leading writers in the field of international law.

> Theory and practice agree nowadays upon the rule that occupation is effected through taking possession of, and establishing an administration over, the territory in the name of, and for, the acquiring State. Occupation thus effected is *real* occupation, and, in contradistinction to *fictitious occupation,* is named *effective* occupation. Possession and administration are the two essential facts that constitute an effective occupation.

1 Oppenheim, *International Law* (Lauterpacht's 7th ed., 1948) 509 (italics in original). And this principle has been applied specifically to the subject of territorial waters.

> It is not easy to determine just what extent of its marginal waters a Nation may bring within its jurisdiction. * * * Each State may regulate as it thinks best the use of those waters as far as the affairs of its citizens, either with one an-

other or with the sovereign, are concerned; but between Nation and Nation the most reasonable rule that can be laid down is that in general the sovereignty of a State over its marginal waters extends as far as is necessary for its safety and as far as it can be effectively maintained; because on the one hand a Nation may appropriate only so much of common property, like the sea, as it has need for some lawful end, and, on the other hand, it would be an idle and ridiculous pretension to claim a right which a Nation would have no means of enforcing. * * * Such claims of sovereignty are respected so long as the Nation which makes them is able to maintain them by force; they cease when it can no longer do so. To-day the area of marginal seas which is within the reach of a cannon shot from the coast is regarded as part of the national territory, and consequently a vessel captured under the cannon of a neutral fortress is not lawful prize.

Vattel, *The Law of Nations,* Bk. I, Ch. XXIII, § 289 (Fenwick transl., 3 Classics of International Law ed., 1916, pp. 108-109).

The true key to the development of the law is to be sought in the principle that maritime occupation must be effective in order to be valid.

Hall, *International Law* (Higgins' 7th ed., 1917), 155.

In this, as in other respects, claims of territorial waters must meet the requirements of international law, or they are not recognized as being valid or

effective. As the International Court of Justice said in the *Fisheries Case* (*United Kingdom* v. *Norway*),

> The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.

Judgment of December 18, 1951, I. C. J. Reports 1951, pp. 116, 132. The court there proceeded to consider what had actually been done by Norway in assertion of its inland water claims, and the extent to which other nations had acquiesced. It said,

> In the light of these considerations, and in the absence of convincing evidence to the contrary, the Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose. [*Id.*, p. 138.]
>
> * * * * *
>
> The Court is thus led to conclude that the method of straight lines, established by the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they

did not consider it to be contrary to international law. [*Id.*, p. 139.]

In the present case it does not appear that the Texas Republic took any steps to effectuate its claim of jurisdiction over three leagues of marginal sea; and in any event the life of the Republic of Texas could hardly be considered long enough to establish such a right against other nations by prescription or user. The Republic of Texas declared its independence from Mexico on March 2, 1836 (1 Laws, Republic of Texas, pp. 3-7), but it did not make its claim of a boundary three leagues in the Gulf until December 19, 1836. 1 Laws, Republic of Texas, p. 133; Appendix A, *infra*, pp. 340-341. Texas was admitted to the Union by the joint resolution approved December 29, 1845. 9 Stat. 108; Appendix A, *infra*, pp. 330-331. Thus, the entire period during which a claim of three leagues was asserted by the Republic of Texas was only nine years and ten days. Prescriptive periods under international law are necessarily inexact and depend on the particular circumstances. 1 Oppenheim, *International Law* (Lauterpacht's 7th ed., 1948) 526-529. However, the United States is not aware of any situation in which so brief a period as nine years of even the most active occupancy has been held to establish rights in the seas in derogation of the common right of nations therein.[60] Periods recognized as adequate have ordinarily been much longer. For example, in the *Grisbadarna Case*, decided October 23, 1909, the Per-

[60] Compare Senator Humphrey's statement on this subject during the debates on the Submerged Lands Act: "Since the Republic of Texas only lasted for 10 years, there was insufficient time for usage to develop." 99 Cong. Rec. 3620.

manent Court of Arbitration pointed out that Sweden had been conducting extensive hydrographic surveys in the disputed area for more than thirty years before the beginning of any dispute; and Swedish use of the waters was apparently of much longer standing than that. Scott, *Hague Court Reports* (1916) 121, 132. In *Lubeck* v. *Mecklenburg-Schwerin*, Lubeck had exercised fisheries jurisdiction over the disputed waters since the end of the 16th century, and had asserted its right in 1896 by a statute which was applied and enforced without protest until February 1925. It was on the basis of those facts that the German Staatsgerichtshof made its provisional order of October 10, 1925, giving Lubeck jurisdiction to control fishing in the disputed waters. See *Annual Digest of Public International Law Cases* (McNair and Lauterpacht, 1925-1926), Case No. 85, p. 114. See also *Lubeck* v. *Mecklenburg-Schwerin* (German Staatsgerichtshof, 1928), *Annual Digest of Public International Law Cases* (McNair and Lauterpacht, 1927-1928), Case No. 3, p. 8. Cf. *Oklahoma* v. *Texas*, 272 U. S. 21, 47, involving a boundary dispute between States, where this Court found it unnecessary to decide "whether the period of twenty-four years * * * could under any circumstances be a sufficient foundation for a prescriptive right—this being a much shorter period than that involved in any of the cases cited." Compare the arbitration treaty of February 2, 1897, between Great Britain and Venezuela, which provided that adverse holding for fifty years should be considered equivalent to good title. See 1 Oppenheim, *International Law* (Lauterpacht's 7th ed., 1948) 528, fn. 2. In the present case, where there appear to have been no acts of exclusive occupancy beyond the three-mile limit, it must be held,

a fortiori, that the claim was not established by mere assertion by domestic statute for about nine years.[61]

2. THE THREE-LEAGUE CLAIM OF THE REPUBLIC OF TEXAS WAS NEVER RECOGNIZED BY THE UNITED STATES

There has been no recognition by the United States of any dominion by the Republic of Texas over a three-league marginal belt, which might supply the deficiency in that Republic's actual control over such area. In the Motion for Leave to File and Brief of the State of Texas, Amicus Curiae (filed during the 1956 Term), there are set out at page 5 certain episodes claimed to amount to such recognition. On scrutiny, none of them will be found properly susceptible of such an interpretation.

(a) *Recognition of the Republic of Texas by the United States*

Mere diplomatic recognition of a country does not constitute acquiescence in its territorial pretensions.

[61] In evaluating the validity of the three-*league* claim by the Republic of Texas, it must be remembered that even the three-*mile* belt of territorial waters did not gain *international* acceptance until well into the 19th century. The United States has sponsored the three-mile belt, for itself and for other countries, since the last decade of the 18th century. *Supra*, pp. 59-101. But as the Court pointed out in *United States* v. *California*, 332 U.S. 19, 32-33, the conception of a maritime belt was not generally accepted at the time this country won its independence from England, and only gradually won acquiescence largely as a result of the efforts of our statesmen; in fact "as late as 1876 there was still considerable doubt in England about its scope and even its existence. See *The Queen* v. *Keyn*, 2 Ex. D. 63." And the 19th and 20th century materials collected in the Government's brief in the *California* case (Oct. Term 1946, No. 12, Original, pp. 30-58) indicate that the general international acceptance of the concept came in the latter portion of the period, the notion of a three-mile territorial belt, both in its territorial and its property sense, being very immature in 1845 and before.

Garvin v. *Diamond Coal & Coke Co.*, 278 Pa. 469, 473; see 1 Hackworth, *Digest of International Law* (1940), 377-378; Lauterpacht, *Recognition in International Law* (1948), 30; and Secretary of State Seward's letter of August 10, 1863, to Gabriel Tassara, *supra*, p. 189. Texas asserts, however, that this Government's recognition of the Republic of Texas was attended by special circumstances which did give it the effect of a recognition of Texas' three-league claim. It is alleged that the independence of the Republic was recognized by a Senate Resolution of March 1, 1837,[62] and that the Texan boundary act was read to the Senate before that resolution was adopted. Motion for Leave to File and Brief of the State of Texas, Amicus Curiae, p. 5. The contention is unsound. The recognition of foreign nations is the business of the President, not the Senate, and the Senate Resolution of March 1, 1837, which Texas cites, did not purport to recognize the Republic of Texas. It merely advised the President that in the opinion of the Senate it would be "expedient and proper" for him to do so.[63] Cong. Globe, 24th Cong., 2d Sess., 214. That it was not regarded as a recognition clearly appears from the appropriation act of March 3, 1837, approved two days later, which appropriated money "for the outfit and salary of a diplomatic agent to be sent to the Republic of Texas, whenever the President of the United States may receive satisfactory evidence that Texas is an independent power, and shall deem

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[62] Mistakenly cited by Texas as March 2, 1837.

[63] When the propriety of such intervention in an executive matter was questioned during the debates on the resolution, Senator Walker, its author, justified it as being a mere "expression of opinion." 13 Cong. Deb., Pt. I, 1012.

it expedient to appoint such minister." 5 Stat. 163, 170.

Moreover, we are aware of nothing which definitely shows that the Texan three-league claim was brought to the attention of the Senate before passage of the resolution of March 1, 1837. It does not appear from the abridged reports of the discussion of the resolution. Cong. Globe, 24th Cong., 2d Sess., 83, 175, 209, 210, 214, see also 109; 13 Cong. Deb., Pt. I, 360, 797, 986, 1010-1013, see also 527-528. Speaking seven years later, on May 21, 1844, Senator Walker said of the 1837 resolution, "As the author of the resolution, before it was adopted, I read to the Senate the boundary of Texas, as described in her organic law, claiming it also as the ancient boundary of Louisiana * * *." Cong. Globe, 28th Cong., 1st Sess., App., 549. Assuming the correctness of Senator Walker's recollection, in 1844, that in 1837 he had read from the Texan boundary statute to the Senate, still we have no specific assurance that he read all of it. The great question at the time was whether the Texan-Mexican boundary was at the Rio Grande or only at the Nueces, and throughout the life of the Republic of Texas both countries had effective control of parts of the intervening area. See S. Doc. No. 1, 29th Cong., 1st Sess., pp. 83, 106. It is at least possible that Senator Walker read only the part of the boundary statute which referred to the Rio Grande—a possibility supported by his further phrase, "claiming it also as the ancient boundaries of Louisiana." The United States originally claimed the Rio Grande as the boundary of Louisiana,[64] a claim which Senator

[64] See letters from Charles Pinckney and James Monroe, American Ministers, to Pedro Cevallos, Spanish Foreign Minister, Janu-

Walker was reasserting in his remarks in 1844 (Cong. Globe, 28th Cong., 1st Sess., App., 549-550), but it never claimed a three-league maritime boundary for Louisiana. In this connection it may be noted, too, that when President Tyler sent to the Senate the annexation treaty of April 12, 1844 (which the Senate refused to ratify), he sent also a map showing the boundary claimed by Texas and an accompanying memoir prepared by Lt. W. H. Emory of the Corps of Topographical Engineers. The memoir purports to quote the Texan Act of 1836 as describing the boundary (S. Doc. No. 341, 28th Cong., 1st Sess., 56):

> Beginning at the mouth of the Rio Grande, thence up the principal stream of said river to its source; thence due north to the [illegible]d degree of north latitude; thence along the boundary line, as defined in the treaty between the United States and Spain, to the beginning.

That quotation is of course erroneous in omitting the opening phrase of the Texan statutory description, "Beginning at the mouth of the Sabine river, and running west along the gulf of Mexico three leagues from land"; but the omission illustrates how little importance was attached at that time to the three-league claim, and how possible it is that it was not brought to

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ary 28, 1805, and April 20, 1805, *American State Papers*, 2 Foreign Relations, 636, 637 and 662-665; letter from James Monroe, Secretary of State, to Luis de Onis, Spanish Ambassador, June 10, 1816, *American State Papers*, 4 Foreign Relations, 429, 430; letter from John Quincy Adams, Secretary of State, to Luis de Onis, March 12, 1818, *American State Papers*, 4 Foreign Relations, 468, 470-475. The claim was relinquished by the treaty of limits, February 22, 1819, 8 Stat. 252, in exchange for the cession of Florida, more than seventeen years before the three-league claim of Texas was first asserted.

the attention of the Senate, even if Senator Walker did read some part of the boundary statute.

Actual recognition of the Republic of Texas was effected by presidential appointment of a chargé d'affaires to be sent to that republic, March 3, 1837 (4 Senate Executive Journal, 631), approved by the Senate on March 7, 1837 (5 Senate Executive Journal, 17). See 4 Miller, *Treaties and Other International Acts of the United States* (1934), 129-140; 1 Moore, *Digest of International Law* (1906), 101. There was nothing in the circumstances of that recognition to give it any unusual effect as an acknowledgment of the territorial extent of Texas, either inland or in the Gulf.

(b). *President Jackson's message of December 22, 1836*

In an apparent attempt to give to this Government's recognition of the Republic of Texas the aspect of a recognition of that republic's boundary claims, Texas refers to a statement made by President Jackson on December 22, 1836, before the United States recognized Texas, that "The title of Texas to the territory she claims is identified with her independence * * * ." Motion for Leave to File and Brief of the State of Texas, Amicus Curiae, p. 5. Texas apparently infers from this that recognition of Texan independence would be equivalent to recognition of Texan boundary claims; but that is not the true meaning of the President's statement, read in context. The statement occurred in a message to the Senate regarding the advisability of withholding, at least for a time, recognition of the independence of the Republic of Texas. Cong. Globe, 24th Cong., 2d Sess., 45. The burden of the message was that, since it was generally anticipated

that Texas would enter the Union after achieving independence from Mexico, the United States should refrain from recognizing that independence before it was clearly established in fact, lest it appear that the United States was giving premature recognition as a mere pretext for its own eventual acquisition of that Mexican territory. The quoted phrase merely explained that independence from Mexico was a prerequisite to the right of Texas over its territory, which was the reason why a precipitate recognition by the United States would have the appearance of a calculated step toward despoilment of Mexico. As this Court explained it in *Kennett v. Chambers*, 14 How. 38, 47-48:

> The whole object of this message appears to have been to impress upon Congress the impropriety of acknowledging the independence of Texas at that time; and the more especially as the American character of her population, and her known desire to become a State of this Union, might, if prematurely acknowledged, bring suspicion upon the motives by which we were governed.

Certainly, President Jackson's message did not have reference to the particular boundaries claimed by the Texan statute of December 19, 1836, for he could not have known of that statute when he sent his message to the Senate on December 22. In the state of communications then existing it would have been impossible for word of the passage of the Texan statute to have reached Washington in three days.[65]

[65] In 1845, communication by courier between Washington and Texas required about two weeks. See *infra*, p. 232, fn. 72.

(c). *Conduct of the United States after recognizing the Republic of Texas*

Subsequent relations between the United States and the Republic of Texas tend to confirm the view that the United States had not recognized the Texan claim to a three-league boundary. By Convention of April 25, 1838, 8 Stat. 511, the United States and Texas agreed to continue in force the boundary established between them by the treaty of limits between the United States and Spain, February 22, 1819, 8 Stat. 252, 254-256, and confirmed by the Treaty of January 12, 1828, between the United States and Mexico, 8 Stat. 372, 374. That boundary began "on the gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river," etc. The Convention of April 25, 1838, provided for survey of a part of that boundary by a joint commission, whose agreed result should have the same force as if inserted in the Convention. The Journal of the Joint Commission stated that they "established the point of *beginning of the boundary* between the United States and the republic of Texas at a *mound on the western bank* of the junction of the river Sabine with the sea * * *." (Emphasis added.) See *supra*, pp. 185-186.

Circumstances in connection with the negotiation of the unratified Treaty of April 12, 1844, for the annexation of Texas, clearly show that the United States did not consider itself committed at that time, by its recognition of the Republic of Texas or otherwise, to accept the boundaries claimed by Texas. That projected treaty provided that "the Republic of Texas * * * cedes to the United States all its territories"

(S. Doc. No. 341, 28th Cong., 1st Sess., p. 10). On April 19, 1844, Secretary of State John C. Calhoun, instructing the American chargé d'affaires in Mexico to inform the Mexican government of it, particularly directed him to call attention to the fact that it "left the boundary of Texas without specification, so that what the line of boundary should be might be an open question, to be fairly and fully discussed and settled according to the rights of each, and the mutual interests and security of the two countries" (S. Doc. No. 341, 28th Cong., 1st Sess., pp. 53-54; Cong. Globe, 28th Cong., 1st Sess., App., 476). Since the Executive Branch of the Government thus plainly construed its earlier act of recognizing the Republic of Texas as not importing a binding acceptance of that republic's boundary claims, the courts should not give it any greater effect in that respect, the question being purely a political one. (See *supra*, pp. 127-142.)

By the Act of March 3, 1845, 5 Stat. 750, Congress showed its understanding that the Texan boundary claim had not been recognized. That act, so far as here material, was as follows:

> *An Act allowing drawback upon foreign merchandise exported in the original packages to Chihuahua and Santa Fé, in Mexico; and to the British North American provinces adjoining the United States.*
>
> *Be it enacted* * * * That any imported merchandise which has been entered, and the duties paid or secured according to law, for drawback, may be exported to Chihuahua, in Mexico, or Santa Fé, in New Mexico * * *.

In thus recognizing Santa Fe as Mexican rather than Texan, although it lay within the limits claimed by Texas, Congress showed its non-recognition of the Texan claims.[66] This act is particularly significant because contemporaneous with the Joint Resolution of March 1, 1845, for the annexation of Texas, the debates on which had clearly brought out the extent of the conflict between the claims of Texas and New Mexico (*infra*, pp. 209-226).

The claim that the Republic of Texas had a boundary three leagues in the Gulf is subject to a further objection, even more conclusive than the mere lack of physical enforcement by Texas or of affirmative recognition by this nation or by other nations generally. It has always been the policy of the United States to assert and maintain the maximum freedom of the seas, and to insist that under international law no nation can unilaterally extend its boundaries more than three nautical miles into the ocean. This American policy was firmly established many years before Texas declared its independence from Mexico, and has been uniformly and vigorously adhered to throughout our history. See *supra*, pp. 59-101. Such a policy having been established by the Executive Branch of the Government, which is charged with the determination of foreign policy, it must be accepted by the courts of the United States as constituting the law on the subject. See *supra*, pp. 127-147. In accordance with that policy, it must be held that the Texan statute of 1836 claiming a boundary three leagues in the Gulf was invalid under international law and was ineffective for any purpose, so far as the United States is concerned.

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[66] See *infra*, p. 225.

> * * * when the executive branch of the Government has determined upon a foreign policy, which can be and is ascertained, and the non-recognition of specific foreign decrees is deliberate and is shown to be part of that policy, such non-recognition must be given effect by the courts. The rule applicable in such circumstances is the same rule applicable to an act of recognition. Any other treatment of a deliberate policy and act of non-recognition would reduce the effective control over foreign affairs by the executive branch to a mere effectiveness of acts of recognition. The control of the executive branch over foreign affairs must necessarily be broader than that.

Latvian State Cargo & Passenger S. S. Line v. *McGrath*, 188 F. 2d 1000, 1003 (C. A. D. C.), certiorari denied, 342 U. S. 816, refusing to recognize, because the State Department so refused, the incorporation of Latvia into the Union of Soviet Socialist Republics. Cf. *Williams* v. *Suffolk Insurance Co.*, 13 Pet. 415, holding that American courts were bound to accept the President's determination that the Falkland Islands, although claimed by Buenos Aires, did not belong to that republic. And see *supra*, pp. 127-147. Thus, regardless of what claim the Republic of Texas made to a boundary three leagues in the Gulf, and regardless of what action it may have taken to effectuate its claim, it must be held that the claim was invalid, and that under international law as applied by the United States the Republic of Texas did not and could not have a boundary extending in the Gulf more than three nautical miles.

3. The Submerged Lands Act does not grant rights on the basis of boundaries that existed only prior to statehood

Even if it should be supposed that the *Republic* of Texas had succeeded in establishing a three-league boundary which was valid under international law and which the United States was bound to recognize, that would not suffice to entitle the *State* of Texas to the submerged lands and resources for a distance of three leagues under the Submerged Lands Act. We have already shown (*supra*, pp. 47-51) that the Submerged Lands Act did not grant a State more than three miles of submerged lands and resources unless the State had a boundary extending a greater distance seaward *at the time* it entered the Union. Claims of boundaries extending more than three miles seaward *prior* to statehood are preserved from prejudice, as boundaries, by Section 4 of the Act, 43 U.S.C., Supp. V, 1312; but only boundaries existing *at the time* of admission to statehood are adopted as defining the extent of the grant made by Section 3, under Section 2(b), 43 U.S.C., Supp. V, 1311, 1301(b). Consequently, the only importance here, in any event, of the claim that the Republic of Texas had a three-league boundary, *before* the State of Texas entered the Union, is as it may provide a foundation for a claim that the State of Texas had a three-league boundary *when* it entered the Union. That claim, as we shall now show, is unsound.

B. THE STATE OF TEXAS DID NOT HAVE A THREE-LEAGUE MARGINAL BELT OR BOUNDARY WHEN IT ENTERED THE UNION

Regardless of whether the Republic of Texas had a marginal belt of three leagues, effectively established

and maintained and accorded international recognition, still the State of Texas, upon entering the Union, did not have a marginal belt in excess of three miles. It was already the long-settled policy of the United States to claim and recognize no greater width of marginal belt than three miles, and Texas entered the Union subject to the national policy in that respect.

1. THE JOINT RESOLUTION OF MARCH 1, 1845, FOR THE ANNEXATION OF TEXAS, DID NOT RECOGNIZE A THREE-LEAGUE BOUNDARY FOR THE STATE

(a). *The terms of the joint resolution for the annexation of Texas*

Texas contends that its three-league boundary claim was recognized by the Joint Resolution of March 1, 1845, for the annexation of Texas, 5 Stat. 797, and refers in support of its contention to the fact that the Texan boundary statute was read to the Senate before that resolution was adopted. Motion for Leave to File and Brief of the State of Texas, Amicus Curiae, p. 5. There is nothing in the resolution or in the proceedings leading up to its adoption to substantiate the contention that the Texan boundary claim was recognized; on the contrary, both the resolution and the debates indicate that it was not.

The Joint Resolution for the Annexation of Texas provided (5 Stat. 797):

> *Resolved* * * * That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas * * *.
>
> 2. *And be it further resolved,* That the foregoing consent of Congress is given upon the following

conditions, and with the following guarantees, to wit: *First,* Said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments * * *.

It would be hard to imagine a more explicit declaration that the United States was not committing itself to maintain the boundary claimed by the Republic of Texas, but was only annexing the area to which that republic was rightfully entitled. That area was not specified, but was left to future adjustment. The boundary adjustment clause was broad enough to include the maritime boundary. It referred to "other governments" in the plural, although Texas had only a single foreign boundary, with Mexico. The only boundary that could concern other governments was the maritime boundary. Again, the clause was not limited to *foreign boundaries,* but included all questions of boundary that might *arise with other governments.* Obviously, maritime boundary questions might so arise, and in fact soon did. See *supra,* pp. 65-66.

(b). *The legislative history of the joint resolution for the annexation of Texas*

The debates on the joint resolution [67] show a general recognition that the Texan boundary statute described

[67] Cong. Globe, 28th Cong., 2d Sess., 84-89, 90-92, 94-97, 100-104, 108-113, 117-120, 121-123, 124-126, 130-133, 135-137, 140-142, 158-161, 166-171, 173-178, 180-184, 186-194, 244-248, 278-282, 287, 292, 296-300, 303-305, 308, 315-316, 320-323, 328-330, 332-336, 341-345, 350-353, 358-363, 371-372; App., 41-44, 55-62, 65-68, 71-73, 78-114, 120-128, 131-134, 138-159, 167-171, 184-199, 200-202, 212-216, 219-227, 229-238, 252-256, 270-277, 283-292, 295-307, 309-319, 321-330, 333-359, 367-410; see also App. 346-347 and 410-412.

a far greater area than the Republic actually controlled or could justly claim, and that the United States would not agree to be responsible for maintenance of the whole claim. We do not find, however, that the Texan boundary statute was actually read to the Senate in the course of those debates. The citation which Texas gives (Cong. Globe, 28th Cong., 1st Sess., App., 549) is to a debate in the preceding session, on the annexation treaty which the Senate refused to ratify, where Senator Walker of Mississippi did read the Texan boundary statute. Senator Walker introduced his remarks with the following (Cong. Globe, 28th Cong., 1st Sess., App., 548):

> It is with deep regret that I have heard the speech of the senator from Missouri [Mr. Benton] against the treaty annexing Texas to the United States. His first objection is to the boundary, which, by the treaty, he says, is made to extend to the Del Norte, and embraces parts of several Mexican States. Now, there is no description of boundary in the treaty. The words are, "the republic of Texas cedes to the United States all its territories." If these territories extend to the Del Norte, they are ceded, but not otherwise. It is said that Texas, by act of her Congress of 1836, claims to the Del Norte, and that therefore the cession of Texas by name necessarily extends to that boundary. But the boundaries of a nation depend on something more than its own claims; these may extend beyond its rightful limits; and when it is ceded by name, that cession extends only to the country embraced within its lawful boundaries. If, then, the Del Norte is not the

lawful boundary of Texas, it is not included in the treaty; and if it be the proper boundary, then it is and ought to be included. This would be the true construction of the treaty itself; but, to remove all doubts, the government of Mexico was informed, by a contemporaneous despatch from our government, dated April 19, 1844, that we had

"Left the boundary of Texas without specification, so that what the line of boundary should be might be an open question, to be fairly and fully discussed and settled according to the rights of each, and the mutual interests and security of the two countries."[68]

That despatch also says:

"You are enjoined also, by the President, to assure the Mexican government that it is his desire to settle all questions between the two countries which may grow out of this treaty, or any other cause, on the most liberal and satisfactory terms, including that of boundary."[69]

There is, then, no spoliation of Mexican territory, even if the facts are as stated by the senator from Missouri, as to the boundary; for it is left an open question, to be settled with Mexico on "the most liberal and satisfactory terms," "according to the rights of each;" thus going much further than, by the law of nations, we were bound to go, in a spirit of generous forbearance towards a neighboring power.

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[68] For the text of the proposed annexation treaty, see S. Doc. No. 341, 28th Cong., 1st Sess., pp. 10-13.

[69] See S. Doc. No. 341, 28th Cong., 1st Sess., pp. 53-54.

Senator Walker went on to read the Texan boundary statute and explain his reasons for believing that the Texan boundary was properly at the Rio Grande del Norte, as claimed by Texas, rather than at the Neuces as argued by Senator Benton. It is clear, however, that he did not believe that the annexation treaty would amount to a recognition of the boundary claimed by Texas; on the contrary, he was supporting the treaty on the specific ground that it would not be such a recognition. Since the treaty was in fact rejected by the Senate (Cong. Globe, 28th Cong., 1st Sess., 652) it is evident that in any event there could be nothing in the episode that would amount to a recognition of the Texan claims by the United States.

It seems that the Texan boundary statute was not actually read on the floor during either House or Senate debates on the Joint Resolution of March 1, 1845, but it does appear as a footnote to a speech by Congressman Haralson of Georgia on that subject. Cong. Globe, 28th Cong., 2d Sess., App. 195 (*infra*, p. 216). The Texan boundary claims were discussed in a general way several times, however, and always with a recognition that they were or might prove to be excessive. Congressman Belser of Alabama, supporting annexation, said that "we should evince to Mexico a disposition to settle the question of boundary on just terms" (Cong. Globe, 28th Cong., 2d Sess., App., 42, Jan. 3, 1845). Congressman Hardin of Illinois, opposing annexation, said in connection with estimates of the amount of public land available to pay the Texan debt (Cong. Globe, 28th Cong., 2d Sess., App., 275, Jan. 15, 1845):

It must be borne in mind that the gross amount of lands estimated to be in Texas is not what is within her acknowledged boundaries, or within her possession; but, in truth and fact, more than two-thirds of the land claimed by her is destitute of a single Texian settler. A portion of this territory is within the boundaries of the Mexican States, Tamaulipas and Coahuila, and nearly all New Mexico is included in it. It is speaking within bounds of the actual fact when it is said that more than two-thirds of all the territory claimed by Texas is in the occupancy of Mexico, with whom she is at war, or of the Camanches and various other Indian tribes, who have been engaged in active hostilities for years with Texas.

Congressman Severance of Maine, also opposing annexation, said with regard to the proposed division of Texas into slave and free States (Cong. Globe, 28th Cong., 2d Sess., App., 369-370, Jan. 15, 1845):

But there is another objection to a division by either or both these lines. Texas never extended north of the Red river at any point. The United States line leaves that river at 100 degrees west from London. From that point Texas extends on the southwest side of that river as far north as the 35th degree, and west to 102 deg., but on the southwest does not go beyond the Neuces (sic), which empties into the Gulf of Mexico about 97 degrees west from London, or 20 degrees west from Washington. Not an inch of territory north of 35 degrees, and only a sharp angle of barren country west of 100 degrees, belongs to Texas, or was ever

included in that department by the Spanish government. Nor have the Texian emigrants conquered it. They attempted it in 1840 in their famous Santa Fe expedition, but their army was all captured and sent prisoners to Mexico, where most of the intruders claimed to be citizens of the United States on a peaceful errand, and were actually pardoned and liberated at the solicitation of our executive—that same executive which now proposes to receive Santa Fe as a cession obtained by the conquest of these pardoned captives. Can anything more preposterous be conceived? When our secretary comes to negotiate the question of boundary with Mexico, which he has notified her government he is willing to leave open, he can very well give up the territory beyond the limits of Texas, leaving nothing for free States.

Congressman Hudson of Massachusetts, opposing annexation, pointed out the danger of involvement with Mexico, and the illusiveness of the proposed division into slave and free States (Cong. Globe, 28th Cong., 2d Sess., App., 336, 338, Jan. 20, 1845):

What is the Texas which we propose to take into our embrace? Not simply the old province of Texas—not the Texas which declared itself independent, and whose independence we and several other nations have recognized—not Texas proper, but a large amount of territory which is not included in Texas—territory over which Texas never extended her conquest or jurisdiction, and which is as much a part of Mexico as the city of Mexico itself. It will be seen, by the map which has been laid upon our tables, and which is to be regarded

as an official document, that the Texas included in the treaty is all that country which lies on the easterly side of the Rio del Norte. And the same map shows us that New Mexico (a Mexican province) is situated on both sides of the Rio del Norte; and that Santa Fe (the capital) is included in the territory which we propose to annex to the United States, though that is as much a part of the acknowledged territory of Mexico as the ground on which stands the city of the Montezumas. Thus it is proposed to invade the right of a neighboring republic with which we are at peace; to rob her of a portion of her known territory, under the pretence of treating with Texas. * * *

* * * * *

* * * The proposition which has been made to prohibit slavery in the territory north of latitude 36½ is perfectly delusive. In the first place, there is but little territory north of that line, and what there is, mostly a barren waste or rugged mountain. And, besides, it will be seen by the map that a considerable portion of this territory is included in New Mexico; and southern gentlemen themselves allow that, in fixing the boundary with Mexico, this must be given up. * * *

Congressman Haralson of Georgia, supporting annexation, pointed out that if the Texan boundary claim were not correct (though he believed that it was), the difficulty could easily be met by a relinquishment of the excess (Cong. Globe, 28th Cong., 2d Sess., App., 195, Jan. 23, 1845):

It has been objected to this measure, that the boundaries of Texas were not defined—that we should have to assume her debts—and that the price of land would be reduced. A sufficient answer may be found to the two first of these objections, in several resolutions which have been reported. More than one of these resolutions contains a provision, that, before Texas should be received, she should agree that the United States should settle the boundary between her and Mexico; and also a provision that Texas should retain her own lands, and pay her own debts. Besides this, in the acquisition of territory by treaty, or otherwise, was such an objection ever heard of as a fear that the party acquiring should get too much by the bargain? Let our nation be just, in this and all other national transactions. It has been so, and, I trust, will ever continue to be so; for, in such a course only can we expect the blessing of Heaven upon us as a nation. If it should turn out that, by receiving the entire limits of Texas, as defined in her act, we acquired more territory than we could rightfully hold, having a just regard to the rights of other nations, all that is necessary to be done is to surrender the overplus. The Texian act of Congress, approved December 19, 1836, I have little doubt, defines correctly the boundary of that republic. [Here the act was quoted in a footnote.] If not, any imaginable difficulty may be adjusted if you adopt one of these resolutions, which provides for the consent of Texas to our settlement of the boundaries.

Congressman Seymour of New York, urging annexation by treaty rather than by joint resolution, questioned the sufficiency of the Texan public lands to pay the debts of that republic. He said (Cong. Globe, 28th Cong., 2d Sess., App., 213, Jan. 23, 1845):

> We have been told that Texas owned a vast quantity of land, out of which an ample fund might be raised to discharge her debts; but we are just as destitute of authentic data in regard to the lands as to the debts. We have, indeed, had a map of Texas laid on our tables; and from that it appears that the territory claimed by Texas contains about three hundred and twenty-four thousand square miles. But is not the title of Texas to this a mere claim? Has she established her boundaries up to the line designated on the map? To say nothing of the Indian title claimed and defended by the Camanches—one of the most powerful and warlike tribes which have ever inhabited North America—it is notorious that no boundary has been traced between Mexico and Texas.

Congressman Ficklin of Illinois, speaking a little later on the same day in support of annexation, said (Cong. Globe, 28th Cong., 2d Sess., 183, Jan. 23, 1845):

> The boundary of Texas has been ably debated by some who have preceded me, and, as *it will in all probability be left to future negotiation to settle,* I need only remark that France, Spain, the United States, and Texas, have always claimed that the boundary was as far west as the Rio del Norte; and they are sustained in this view by the

Spanish geographers themselves. [Emphasis added.]

Congressman Dromgoole of Virginia advocated admitting a definite area, adjoining Louisiana and the coast, as a State, and the rest as a territory, partly to facilitate later adjustment of uncertain boundaries. He said (Cong. Globe, 28th Cong., 2d Sess., App., 304. Jan. 24, 1845):

> * * * is it not, in many respects, to be preferred that the boundaries of the new State should at once, by the fundamental law, be definitively settled. It will be far more practicable to adjust and settle questions relating to this Territory and its boundaries, whether we look to difficulties at home or abroad, in its condition of mere territory, than if embraced in the actual limits of the State.

Congressman McIlvain of Pennsylvania, opposing annexation, said (Cong. Globe, 28th Cong., 2d Sess., App., 373, Jan. 25, 1845):

> But we are told that Texas, by an act of Congress, has defined her bounds, and embraced within her limits a much larger extent of territory. So she has; but what right had she to do so? It was Texas that revolted against the government of Mexico; it was Texas that achieved her independence upon the plains of San Jacinto; it was Texas that we have recognized as an independent State: and it is Texas that you propose annexing to this Union; and if you adopt these resolutions, you will annex nothing but Texas.
>
> An assertion of independence by Texas can give

her no claim beyond her just limits; and as well might the "old thirteen" have, by act of Congress, thrown a title over all the surrounding provinces of Great Britain, or Louisiana and the Floridas, as Texas over parts of adjacent provinces which had not been associated with her in the revolutionary struggle, nor ever acknowledged her jurisdiction.

It is not pretended that Texas acquired this territory by conquest, for she has never fought a battle, or marched a soldier beyond her original limits. Where, then, is the claim of Texas to this territory? It is an ideal claim, and is worth just as much as the paper upon which it is inscribed. And this is the territory out of which free States are proposed to be formed * * *.

But Texas proper does not extend north to 36° 30′—36° being the utmost limit prescribed by the government of Mexico, through its commissioner, General Almonte, and 34° by Colonel Austin, its co-proprietor and patron. And, as these resolutions propose annexing only the territory "rightfully belonging to the republic of Texas," it is not probable that, in an adjustment of boundary with the Mexican government, "upon the most liberal terms," as suggested by the President, a more northerly line will be obtained * * *.

Thus, we find congressmen holding every sort of view on the question of annexation agreed that the boundary claimed by the Republic of Texas greatly exceeded the area that it controlled or was properly entitled to, and that the United States must retain the right to reach an agreement with Mexico as to the proper location

of the boundary. The same view appeared in the Senate. Senator Benton of Missouri, speaking in support of his own proposal similar to that of Congressman Dromgoole, *supra,* said (Cong. Globe, 28th Cong., 2d Sess., 245, Feb. 5, 1845), "The assent of Mexico to the annexation is judged to be unnecessary, but no one judges her assent to a new boundary line to be unnecessary * * *."

Senator Huntington of Connecticut, opposing annexation of Texas, said (Cong. Globe, 28th Cong., 2d Sess., App., 400, Feb. 21-22, 1845):

> A part of the territory claimed to be within her limits is in the possession of Indians, and another part in the possession of Mexico; so that by the acquisition of Texas we obtain a territory of whose extent we are ignorant—covered with patents and grants, under a mortgage the amount of which is unknown—the title in dispute, and to be obtained, if at all, by a war with another power.

Senator Dayton of New Jersey, also opposing annexation, said (Cong. Globe, 28th Cong., 2d Sess., App., 387, 388, 390, Feb. 24, 1845):

> Though the boundaries of every other State are required to be most accurately defined before admission, Texas you propose to take running, wherever you may find her. * * *
>
> * * * * *
>
> But the boundaries of Texas, as declared by her constitution, extend, perhaps, a hundred miles west of the white settlements, and with a line perhaps a thousand miles long. Much of this country

is occupied by Mexicans. In it are Santa Fe, and a considerable number of towns, with populations ranging from 6,000 down to 50. * * *

* * * * *

But my object in referring to this clause was in reference to the slavery line [*i.e.*, 36° 30′ north latitude] presented by its provision. There is no pretence of there being any thing north of that line of the slightest value, if, indeed, Texas really owns a foot there. * * *

On February 17, 1845, after the annexation resolution had passed the House and while it was before the Senate, Congressman Rayner of North Carolina, speaking to the House on the Army pay bill, referred to military problems that might arise if the annexation of Texas were held to commit the United States to defend the entire boundary claimed by the Republic of Texas (Cong. Globe, 28th Cong., 2d Sess., App., 411-412):

Another objection with me to the annexation of Texas in the present condition of affairs, and a strong one, too, is the difficulty to which it is likely hereafter to give rise, growing out of the question of her western boundary. Now it will not be pretended by any one that Texas proper, as comprehended under the old French and Spanish titles to Louisiana, extended anything like as far west as the territory now claimed by the present government of Texas. If old Texas did extend to the Del Norte, yet it will be admitted, I presume, and can, I learn, be established by reference to the oldest

maps and geographies, that it followed the eastern bank of that river only a short way, and then struck off at a wide angle far to the north or north-east, leaving something like one hundred millions of acres of land, now claimed by Texas, to the undisputed dominion of Spanish Mexico. A portion of this territory was settled by the Spaniards, long before La Salle ever visited the country. It has been under Spanish or Mexican dominion ever since. It comprises a portion of four Mexican departments, viz: New Mexico, Chihuahua, Coahuila, and Tamaulipas—some of them containing prosperous towns, commanded peacefully by Mexican governors, inhabited by a people represented in the Mexican Congress, and where no Texian has ever put his foot, except as a prisoner, and where no such thing as Texian rule and dominion have ever been known. Texas claims the country on the east of the Del Norte, from its mouth to its source. She has laid down this as her boundary in her constitution. She is to transfer to this government, or retain to herself, all the unappropriated lands within the limits of her republic. She has defined these limits; and it is with Texas, claiming territory as extending to the Del Norte in its whole length, that you propose to make the contract. It may be said that this question of boundary must be left to future negotiation with Mexico. But will not this government, if Texas is now annexed, with her definition of boundary, be precluded from making any concessions to Mexico? Will not any compromise as to boundary be re-

sisted by Texas as a breach of faith towards her? She might say that Texas had defined her own limits; that with Texas, as thus bounded, we had contracted for her admission into the Union; and that this government was bound by every consideration of faith and honor to see that Texas should not be again mutilated. If this government takes from Texas the surrender of her lands, this compact of plighted faith will be the watchword of the pioneer as he gradually encroaches on Mexican soil; and, if we leave Texas her lands, interest as well as pride and feeling will prompt her to demand that this government shall preserve to her her ancient limits, as defined by herself, and with which definition of limits by herself, this government contracted with her, and received her into the Union.

Whether this reasoning be founded in justice or not, there is some plausibility in it; and if Texas is admitted with her present definition of boundary, this government will at no very distant day be placed in the attitude of committing a manifest outrage upon Mexico, by despoiling her of a portion of her acknowledged territory, or of being charged with a violation of faith, and harassed with ceaseless murmurs and complaints by the people of Texas. * * *

Again on February 25, 1845, while the bill was still under consideration in the Senate, Congressman Brinkerhoff of Ohio, in connection with arrangements for the printing of a map of Texas for the use of the

House, criticized the map as showing more than the actual limits of Texas. He quoted a letter on the subject from the Corps of Topographical Engineers, and continued (Cong. Globe, 28th Cong., 2d Sess., 346-347):

> It seems, therefore, sir, * * * that the Topographical Bureau has no information in regard to the old boundaries of Texas; can tell us nothing as to what Texas was; and refers us to the atlas of Mr. Tanner. Now, sir, I have consulted Mr. Tanner's atlas, and find that it corresponds substantially with all our other generally received maps of those countries. And, sir, what is the result? What is the northern boundary of Texas there? Is it latitude forty-two degrees north? No, sir. It is the Red river, in latitude thirty-four degrees north. All the ancient Mexican territory north of the Red river north of thirty-four degrees, is included within the State of New Mexico, of which Santa Fé is the capital! And this unquestionably is the true state of the case. Texas never extended north of thirty-four degrees; all north of that line is New Mexico.
>
> This map, then, intended for the information of the people, is grossly indirect; it is, in effect, a miserable cheat, a monstrous fraud upon the people of the free States. Here we have passed resolutions for the annexation of Texas to the Union; and, by way of compromise, we have provided for the exclusion of slavery from all that part of Texas lying north of latitude 36 degrees 30 minutes north; when in truth, and in fact, Texas never extended —her northern boundary never reached—within two degrees of that so-called compromise line!

Yes, sir, this map is a cheat, a fraud upon the people of the free States. From it they are led to believe that some portion (though small) of the Texian territory is secured to them; when, in truth, not one foot of it reaches the line of the compromise. This compromise does not run through Texas, or any part of it; it runs through New Mexico, and New Mexico is a part of Mexico as much as is the city of Santa Cruz itself. Texas never exercised any jurisdiction over it, either when she herself was a member of the Mexican confederacy, or since her independence. Texian laws were never acknowledged there, and the foot of Texian soldier never trod upon the soil of New Mexico, except in the character of a prisoner of war. It was not hers originally, nor is it hers by right of revolution, possession, or conquest. And we ourselves are daily in the habit of recognising the right of Mexico to this province by the protection we afford to the Santa Fe trade, and by the payment of duties on the goods we export to that city.[70] If, therefore, New Mexico shall ever become a part of our territory, we must first acquire it by purchase, or take it by conquest. I hope, therefore, Mr. Speaker, that an amended edition of this map will be ordered. * * *

Congressman J. P. Kennedy of Maryland replied, agreeing that Texas, as known to the maps, did not extend beyond 34° north. He continued (*ibid.*):

In 1836, the legislature of Texas passed an act declaring that her boundaries extended north, em-

[70] See, *supra*, p. 205.

bracing New Mexico, Santa Fé, Coahuila, &c., up to 42°. The treaty of the last session was based on this claim by Texas; and it was one great objection to it that it proposed to embrace a part of Mexico, which there was no desire, he believed, on the part of any of our statesmen that our government should take possession of whenever Texas was admitted into the Union.

It is evident that Congress was well aware of the questionable character of the Texan boundary claim, and intended that the annexation resolution should not commit the United States to maintain the boundary as claimed by Texas. The terms of the resolution, providing for annexation only of the territory "properly included within, and rightfully belonging to" the Republic of Texas, and reserving to the United States the right to adjust all boundary questions that might arise with foreign nations, perfectly carried out that intent. While the great questions at the time concerned the inland boundary, it is plain that the maritime boundary was given no greater degree of approval.

(c). *Annexation negotiations*

Correspondence regarding the annexation negotiations makes it clear that the United States gave the Texans no assurances that their claimed boundaries would be maintained. On the contrary, it shows that the Texan claim had always exceeded the Republic's actual occupancy, and that the annexation was understood to leave boundary questions open to negotiation and settlement by the United States.

On March 29, 1845, Texas had proposed to Mexico preliminary conditions for a treaty recognizing Texan

independence, in which Texas agreed to arbitrate disputed boundary questions. S. Doc. No. 1, 29th Cong., 1st Sess., 88. On July 11, 1845, Andrew J. Donelson, the American chargé d'affaires in Texas, who had conducted the discussions with Texas regarding annexation, wrote Secretary of State Buchanan a long letter devoted almost entirely to the question of Texas boundaries. He referred to the Texan proposals to Mexico, saying that there had been no reason for the United States to commit itself to maintain boundaries that Texas was willing to arbitrate. The following passages are particularly significant, as showing that there had been no commitment to Texas to maintain its entire boundary claim (S. Doc. No. 1, 29th Cong., 1st Sess., 101-105):

> You will have observed that in my correspondence with this [*i.e.*, the Texan] government there has been no discussion of the question of limits between Mexico and Texas. The joint resolution of our Congress left the question an open one, and the preliminary proposition made by this government, under the auspices of the British and French governments, as the basis of a definitive treaty with Mexico, left the question in the same state. * * * The proclamation of a truce between the two nations, founded on propositions mutually acceptable to them, leaving the question of boundary not only an open one, but Mexico in possession of the east bank of the Rio Grande, seemed to me inconsistent with the expectation that in defence of the claim of Texas our troops should march immediately to that river. What the Executive of Texas had determined not to fight for, but to settle

by negotiation, to say the least of it, could as well be left to the United States on the same conditions.

* * * [The question] was whether, under the circumstances, we should take a position to make war for this claim, in the face of an acknowledgment on the part of this government that it could be settled by negotiation. I at once decided that we should take no such position, but should regard only as within the limits of our protection that portion of territory actually possessed by Texas, and which she did not consider as subject to negotiation.

* * * * *

It was also apparent that no military expedition within the power of Texas to start, at this late period, could have placed the entire question of limits beyond the necessity of future negotiation, after the acceptance of our proposals. The boundary of Texas, as defined by her statutes, runs up the Rio Grande from its mouth in the sea to its source, cutting off portions of Tamaulipas, Cohahuila, and New Mexico. Above the point on the Rio Grande where it enters New Mexico, there has been no occupancy by Texas; and it is obvious, so far as that region is concerned, no military movement could have taken it out of the category in which it is left by the terms of our joint resolution. So, whatever may have been the success of the attempt to drive the Mexicans from Loredo and other lower points, the difficulty would have remained the same in regard to the extensive Santa Fe region above.

Donelson then proceeded to justify the Texan claim to the Rio Grande, and to indicate that he had "omitted no opportunity of satisfying all parties here that the United States would, in good faith, maintain the claim" (*id.*, p. 103), but the context and content make it apparent that this referred only to the area below the New Mexico border. He said, for example, "Mexico never can enforce authority east of that stream" (*id.*, p. 104), which was certainly not the case in New Mexico. In concluding, Donelson said (*id.*, p. 104):

> There are no unfavorable symptoms in the proceedings of the convention. There is a disposition in some members to resort to some action to exhibit in strong terms the expectation of Texas that the Rio Grande will be maintained as the boundary, but no provision making this a *sine qua non* in our action hereafter will be adopted. Members of all parties have assured me that I need apprehend nothing—that annexation is settled, and that the constitution will contain nothing that has not been sanctioned by numerous precedents in the constitutions of the other States of the Union.

In an attempt to show that the annexation of Texas did include a recognition by the United States of the Texan boundary claims, the State refers to a passage in a letter from President James K. Polk to Donelson, written June 15, 1845, during the pendency of the annexation negotiations. Motion for Leave to File and Brief of the State of Texas, Amicus Curiae, p. 5. The statement was, "Of course, I would maintain the Texian title to the extent which she claims it to be * * *." It was contained in a letter written while

Texas was considering the proposal, which it adopted shortly afterward, to enter the Union under the Joint Resolution of March 1, 1845, 5 Stat. 797. Texas characterizes the statement as a solemn promise, made in reply to the insistence of the Texans that the United States give assurance that it would defend the boundaries established by Texas. However, examination of the whole letter and the surrounding circumstances puts a very different light on it. The letter was a confidential one to Donelson, and the quoted passage referred solely to the narrow question of whether the United States should take any military action if Mexican armies invaded Texas after the annexation proposal was accepted by the Texan Congress but before it was accepted by the Texan convention.[71]

The background of this phase of the correspondence was that Mexico, strongly opposing annexation of Texas to the United States, had belatedly offered to recognize Texan independence if annexation were rejected. See S. Doc. No. 1, 29th Cong., 1st Sess., 46, 58-59, 64-65, 87-90. Texas feared that, if it rejected the Mexican proposal and agreed to annexation, Mexico would retaliate with armed invasion, and Texas requested American military aid in such event. *Id.*, pp. 57, 61-62. There was an exchange of letters between

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[71] The citation which Texas gives for the letter is Papers of President James K. Polk, vol. 72, p. 6767, Library of Congress. Motion for Leave to File and Brief of the State of Texas, Amicus Curiae, p. 5, fn. 8. The Polk papers in the Library of Congress have been recompiled in recent years, and the Library is unable to identify that citation. The Polk papers contain no letter at or near the given date containing the quoted language, but such a letter of that date does appear in the Library's collection of the Andrew J. Donelson papers, vol. 10, folios 2068-2070, and we assume that to be the letter referred to. Since it seems never to have been published, we reprint it in Appendix G, *infra*, pp. 405-408.

Donelson and Secretary of State Buchanan, in which Donelson asked for military aid for Texas in case of a Mexican invasion after the Texan congress approved annexation, and Buchanan took the position that such aid could not be given until after the Texan convention had also given its approval, as required by the joint resolution of our Congress. *Id.*, pp. 41, 57, 64, 66. However, on June 15, 1845, Buchanan finally agreed that United States forces could intervene, even before the convention approved annexation, if the invasion should be of such character that Texan forces could not repel it, and it seemed calculated to prevent the convention from acting freely or at all. *Id.*, p. 42. President Polk's letter, quoted by Texas, was written on the same day, and with reference to the same dispatches from Donelson. After urging that the Texan convention approve annexation immediately upon meeting on July 4, 1845, before taking time to formulate a State constitution, the President said (Appendix, G, *infra*, pp. 406-407):

> In the contingency mentioned in Mr. *Buchanan's* dispatch—viz—that a Mexican army should cross —The Rio Grande,—after the Congress of Texas have given their assent to annexation, but before the Convention have done so, it is submitted to your discretion to judge—of the propriety or necessity—of ordering our Army and Navy to repel the invaders of Texas. If that invasion—in this stage of the action of Texas,—shall be in your judgment calculated to over-awe or shall in fact interfere with or disturb—the free and peaceful deliberations of the Convention—then in my judgment—the public necessity for our interposition—

will be such,—that we should not stand—quietly by—and permit—an invading foreign enemy—either to occupy or devastate any portion of the Texian territory. Of course I would maintain the Texan title to the extent which she claims it to be, and not permit an invading enemy—to occupy a foot of the soil East of The *Rio Grande*.—I hope however that there will be no necessity to consider of what it may be proper to do under the contingency supposed. Our troops at Fort Jessup—cannot reach the mouth of the *Sabine*—before the 4th of July,—(the day the Texas Convention convenes)—and if the assent of that body is promptly given—no question of our power to expel the Mexican army from her soil will exist,—and it will be promptly and efficiently done.—[Emphasis in original.]

The President's letter was not intended to be made public. He wrote it in his own hand, headed it "Confidential", doubly underscored, and concluded, "I have written in great haste, but as my letter is *private* and not *public* I will not transcribe it or take time to put it into better form." (Underscoring in original.) Its purpose was to give Donelson discretion as to what military aid he should render in a contingency which did not in fact arise; it was not a public pronouncement to the people of Texas. It was in response to requests made by the Texans not in a spirit of imposing conditions on the annexation but rather out of their urgent desire to consider annexation as substantially accomplished even before the convention agreed to it.[72]

[72] Even if President Polk's letter had been intended as an inducement to the Texans to approve ratification, it arrived too late to have any effect as such. It reached Donelson at Washington, Texas,

Prior and subsequent correspondence makes it clear that Donelson had not given the Texans any assurance that their claimed boundary would be maintained. *Supra*, pp. 227-231. On the contrary, it shows that the Texan claims had always exceeded their actual occupancy, and that the annexation was understood to leave boundary questions open to negotiation and settlement by the United States.

(d). *Subsequent interpretations*

Subsequent legislative and judicial interpretation bears out the fact that the annexation of Texas did not include a recognition of the boundaries claimed by the Republic of Texas. After the area west of Texas was acquired from Mexico by the Treaty of Guadalupe Hidalgo, February 2, 1848 (9 Stat. 922), the United States paid Texas $10,000,000 to relinquish its claim to all territory west and north of the present boundaries of the State (Act of September 9, 1850, 9 Stat. 446), but that payment was regarded by Congress as in settlement of a disputed claim and not as in recognition of an established Texan right to that area. It was, for example, so explained by Senator Pearce, by whom the bill was introduced. Cong. Globe, 31st Cong., 1st Sess., 1540-1542. In accordance with that view, it has been held that eastern New Mexico,

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from which place he "immediately" answered it on July 2, 1845. The Texan congress had already approved annexation on June 23, 1845 (Laws Rep. Tex., 9th Cong., Ex. Sess., p. 4), and the convention approved it on July 4, 1845. Donelson left Washington for Austin on July 3, arriving the evening of July 5, to be greeted with a certified copy of the convention's ordinance approving annexation. S. Doc. No. 1, 29th Cong., 1st Sess., 91, 96, 97, 99. Thus, the convention had acted before Donelson had any opportunity to report the contents of the President's letter even if he had wished to do so.

although claimed by Texas, was not brought into the Union by the annexation of Texas in 1845, but was acquired from Mexico by the Treaty of Guadalupe Hidalgo in 1848. *De Baca* v. *United States,* 36 C. Cls. 407. Just as the resolution for annexation was not in itself a recognition of Texas' claims on its inland boundaries, so it cannot be considered a recognition of its claims in the Gulf.

2. THE INVARIABLE FOREIGN POLICY OF THE UNITED STATES HAS BEEN TO CLAIM NO MORE THAN THREE MILES OF MARGINAL SEA

We have already shown that the width of the marginal belt and the location of the maritime boundary are matters of foreign policy (*supra,* pp. 127-147), and that it has been the unvarying policy of the United States ever since 1793, in furtherance of the principle of freedom of the seas, to claim no more than three miles of marginal sea for itself, just as it recognizes no more for other nations (*supra* pp. 59-106). That policy was settled long before Texas entered the Union, and the United States never departed from it.

3. WHEN TEXAS ENTERED THE UNION IT BECAME SUBJECT TO THE FOREIGN POLICY OF THE UNITED STATES

(a). *In general.* It is elementary that when Texas entered the Union it relinquished to the Federal Government all of its control over foreign policy, and subjected itself to the foreign policy of the United States.[73] From the very instant of its statehood, Texas

[73] In the debates on the joint resolution under which Texas was annexed, Congressman Collamer of Vermont pointed out this obvious fact: "If we annex Texas, even as a State, we assume all that branch of her sovereignty which represents her foreign relations." Cong. Globe, 28th Cong., 2d Sess., App., 402. See also *infra,* p. 236.

has lacked capacity to have a foreign policy of its own. In that respect it is on an equal footing with the original States, of which Rufus King said in the Constitutional Convention,

> The states were not "sovereigns" in the sense contended for by some. They did not possess the peculiar features of sovereignty,—they could not make war, nor peace, nor alliances, nor treaties. Considering them as political beings, they were dumb, for they could not speak to any foreign sovereign whatever. They were deaf, for they could not hear any propositions from such sovereign. They had not even the organs or faculties of defence or offence, for they could not of themselves raise troops, or equip vessels, for war.

5 *Elliott's Debates* 212, quoted with approval in *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 317. So far as concerns Texas as a State, complete control over its foreign policy has always been vested in the Federal Government. As this Court has said,

> * * * complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. * * * In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state

> laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power.

United States v. *Belmont*, 301 U. S. 324, 331-332. This principle was reaffirmed in *United States* v. *Pink*, 315 U. S. 203, 233-234, as follows:

> We repeat that there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.[74]

This incapacity of a State as to foreign affairs and foreign policy was recognized by Texas itself when it entered the Union. Thus, shortly before the annexation, the Secretary of State of the Republic of Texas declared that "after the organization of the State government shall have succeeded to that of the republic, the settlement of all questions growing out of her exist-

[74] See also *The Federalist*, Nos. 3, 80; *Holmes* v. *Jennison*, 14 Pet. 540, 570; *Henderson* v. *Mayor of New York*, 92 U.S. 259, 273; *Chy Lung* v. *Freeman*, 92 U.S. 275, 279-280; *Chinese Exclusion Case*, 130 U.S. 581, 606; *United States* v. *Rauscher*, 119 U.S. 407, 412-414; *Valentine* v. *U.S. ex rel. Neidecker*, 299 U.S. 5, 8; *Hines* v. *Davidowitz*, 312 U.S. 52, 63; *United States* v. *California*, 332 U.S. 19, 34-36.

ing treaty relations with foreign powers must, so far as Texas is concerned, be necessarily referred to the government of the United States." S. Doc. No. 375, 29th Cong., 1st Sess., p. 3. Clearly, at the instant that Texas became a State, subject to the Constitution and laws of the United States, it became subject to the foreign policies of the United States.

(b). *Boundary questions.* As we have already pointed out (*supra*, pp. 208-209), this exclusive federal control over questions of foreign policy was specifically applied to boundary questions by the Joint Resolution of March 1, 1845, consenting to the annexation of Texas. That resolution provided (5 Stat. 797, Appendix A, *infra*, pp. 329-330):

> That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: *First*, Said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments * * *.

Long before 1845 when Texas was annexed, the policy of the United States, in support of the doctrine of freedom of the seas, had been settled not to claim more than three miles of marginal sea. (See *supra*, pp. 59-65.) This made it unnecessary to take any further action to "adjust" the maritime boundary of Texas, for when Texas entered the Union that policy extended to it automatically, just as existing federal statutes extended to it automatically without further action by Congress. Thus, when Great Britain, a few years after the annexation, protested against what it understood to be a claim of a three-league marginal belt, found in the provision of the Treaty of Guadalupe Hidalgo between the United

States and Mexico that "The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande * * *" (Article V, 9 Stat. 922, 926), the United States replied that it had no intention of questioning the rights of other powers in the Gulf (see *supra*, pp. 65-66).

It is manifestly necessary that the maritime boundary of Texas automatically and instantaneously, from the moment of its statehood, should conform to that prescribed by the foreign policy of the United States. The alternatives would be that the previous and conflicting policy of the Republic of Texas must remain perpetually and immutably in effect, that it could only be changed by action of the State, or that it could only be changed by affirmative action of the Federal Government. None of these alternatives is admissible. It is inconceivable that after Texas, having power as a Republic to modify its foreign policy at will, joined the United States, whose government of course has power to modify its own foreign policy, any element of the policy of Texas was thereby frozen beyond the power of either the state or Federal government to modify thereafter. Clearly, a continuing power to control foreign policy must reside somewhere. Equally clearly, it cannot reside in the State of Texas, for, as pointed out above, States are incompetent to deal with that subject.[75] Consequently, it must reside in the

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[75] *A fortiori*, a State cannot have a policy which conflicts with the foreign policy of the United States. *United States* v. *Belmont*, 301 U.S. 324, 327, 331-332; *Hines* v. *Davidowitz*, 312 U.S. 52; *United States* v. *Pink*, 315 U.S. 203, 230 *ff*; see also *Clark* v. *Allen*, 331 U.S. 503, 508, 517; *Hauenstein* v. *Lynham*, 100 U.S. 483, 488-490.

Federal Government. But if that is so, there is no reason why affirmative action would be necessary to extend the foreign policy of the nation over the new State. Annexation itself accomplished that in extending over Texas the Constitution and laws of the United States.[76]

To suppose that the annexation could have left the United States with a foreign policy applicable to Texas different from its policy elsewhere would be incongruous enough even if it could be assumed

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[76] The 1845 Constitution of the new State of Texas, which was laid before Congress prior to the adoption of the admission resolution of December 29, 1845, did not set forth the boundaries of the new State. The only provision of that Constitution which Texas has claimed as continuing the Republic's boundaries (see Brief for the State of Texas in Opposition to Motion for Judgment, Oct. Term, 1949, No. 13, Orig., p. 81) is Article XIII, Section 3, providing:

> All laws and parts of laws now in force in the republic of Texas, *which are not repugnant to the constitution of the United States, the joint resolutions for annexing Texas to the United States*, or to the provisions of this constitution, shall continue and remain in force as the laws of this State, until they expire by their own limitation, or shall be altered or repealed by the legislature thereof [H. Doc. No. 2, 29th Cong., 1st Sess., 123; 2 Gammel's Laws of Texas 1293-94; emphasis added].

The emphasized portions show that the new State was subordinating itself and its laws to its new position *vis-a-vis* the Federal Government. Very soon after coming into existence, the State gave another formal expression to its recognition that the nature of its rights in the land within its boundaries, as well as the extent of its boundaries, was to be determined by reference to the Federal Constitution as well as the joint resolution for annexation. By Joint Resolution of April 29, 1846, the legislature declared that "the exclusive right to the jurisdiction over the soil included in the limits of the late Republic of Texas * * * is now vested in and belongs to the State, *excepting such jurisdiction as is vested in the United States, by the constitution of the United States*, and by the joint resolution of annexation * * *." (Tex. Laws, 1846, 1st Leg., p. 155. Emphasis added.)

that the difference could in fact be restricted to Texas. But with respect to the question of the width of the marginal sea, no such restriction would be possible. As pointed out above (*supra*, pp. 59-101), from the earliest days of its history the United States has adhered to the policy of insisting on freedom of the seas, subject only to the territorial jurisdiction of littoral nations over a belt of water extending three miles from their coasts. Were the United States to claim a greater jurisdiction for itself off the coast of Texas, it would not only be inconsistent with its traditional position on the subject but would necessarily be a recognition that such a claim could be binding under international law, and would make it logically difficult, if not impossible, for the United States to continue to oppose similar claims by other nations. By annexing Texas the United States certainly did not commit itself to relinquish what has been a fundamental cornerstone of its world policy throughout its history, vital alike to its commercial, fishing and defensive interests, and to substitute a policy dictated by the late Republic of Texas. So to hold would mean in effect that Texas was not annexed to the United States, but that the United States was annexed to Texas.[17] It must be concluded that in this, as in other respects, when Texas entered the Union it became subject, immediately and automatically, to the foreign policies of the Union, as developed by the Federal Government.[18]

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[17] During the House debates on the joint resolution for the annexation of Texas to the United States, a proposal to annex the United States to Texas was ruled out of order. Cong. Globe, 28th Cong., 2d Sess., 173.

[18] It seems hardly necessary to point out that there is no room for any suggestion that the boundary of the State of Texas might extend into the Gulf beyond the boundary of the United States.

C. THE SUBMERGED LANDS ACT DID NOT FIX OR CONFIRM THE NATIONAL OR STATE BOUNDARY AT THREE LEAGUES FROM THE COAST OF TEXAS, OR GRANT TEXAS THE SUBMERGED LANDS AND RESOURCES TO THAT DISTANCE

Texas' second alternative basis for its three-league claim is that the Submerged Lands Act itself confirmed the State boundary and fixed the national boundary at three leagues off the coast of Texas and granted the State the submerged lands and resources to that distance. Answer of Defendant the State of Texas to Second Cause of Action, Par. X, pp. 4-5. We have already shown that the Act neither changed nor declared the location of the State boundary, and did not fix the national boundary at three leagues.[79] It did not make a definitive grant of three leagues to any State, but made any grant of more than three miles contingent on a showing that the State boundary was actually at a greater distance in the Gulf, leaving at large the questions of whether any State boundary was or could be at such greater distance. *Supra*, pp. 31-47.

D. THE SUBMERGED LANDS ACT DID NOT GRANT RIGHTS IN SUBMERGED LANDS OR RESOURCES SEAWARD OF STATE BOUNDARIES

Texas' third alternative basis for its three-league claim is that the Submerged Lands Act granted Texas all of the rights of the United States in the submerged lands and minerals of the continental shelf to a dis-

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Certainly our system of government has never contemplated the possibility that a State might be partly within the Union and partly outside it. The objections to any such idea are too obvious to require discussion.

[79] See the discussion, *supra*, pp. 51-58, 103-106.

tance of three leagues irrespective of the location of the national or State boundary. Answer of Defendant the State of Texas to Second Cause of Action, Par. XI, p. 5. We have already shown that the grant made by that act was, on the contrary, explicitly limited to State boundaries (*supra*, pp. 31-51), that State boundaries cannot exceed the national boundary, and that the national boundary is only three miles from the coast (*supra*, pp. 59-101).

E. THE STATEMENTS OF THE PRESIDENT AND ATTORNEY GENERAL BROWNELL

Certain statements made by President Eisenhower and former Attorney General Brownell on the subject of offshore submerged lands and resources have sometimes been referred to with respect to the Government's legal position, as stated in this brief, regarding the claims of Texas. Because question has been raised, in the light of those statements, as to the actual position of the Executive Branch of the Government on the present issue, the President has directed that those statements be set forth in this brief for the information of the Court.

On April 17, 1953, Senator Clinton P. Anderson and twenty-four other Senators wrote to President Eisenhower urging him to oppose S. J. Res. 13 (the Submerged Lands Act) and asking his views as to what its effect would be as to States claiming more than three miles of marginal sea. 99 Cong. Rec. 3532. The President answered that inquiry on April 24, 1953, quoting his former statements on the subject and reaffirming his previous position. He said (99 Cong. Rec. 3865):

The Republican platform clearly stated, "We favor restoration to the States of their rights to all lands and resources beneath navigable inland and offshore waters within their historic boundaries."

During the past campaign on October 13 I made the following statement:

"So, let me be clear in my position on the tidelands and all submerged lands and resources beneath inland offshore waters which lie within historic State boundaries. As I have said before, my views are in line with my party's platform. I favor the recognition of clear legal title to these lands in each of the 48 States.

"This has been my position since 1948, long before I was persuaded to go into politics. * * *

"The Supreme Court has declared in very recent years that there are certain paramount Federal rights in these areas. But the Court expressly recognized the right of Congress to deal with the matters of ownership and title.

"Twice by substantial majorities both Houses of Congress have voted to recognize the traditional concept of State ownership of these submerged areas. Twice these acts of Congress have been vetoed by the President.

"I would approve such acts of Congress."

The next day, October 14, I made specific reference to the State of Texas:

"Just a hundred and seven years ago the United States Senate decided that the public lands of Texas were not worth $10,000,000. * * * So the United States said to Texas, 'Keep your debts—

and keep your lands. We don't want either.' And so the State of Texas paid off the $10 million debt of the Republic. It kept its 200 million acres of lands, including the submerged area extending 3 marine leagues seaward into the Gulf of Mexico."

My position is the same today. It was further amplified by the administration representatives in the hearings before the Senate and your committees considering the legislation.

I favor the prompt passage by the Senate of Senate Joint Resolution 13 with any amendments the Senate may approve not inimical to the principles which I have expressed. It has never been my belief that the several States should have any title to lands beyond their historical boundaries on the Continental Shelf.

* * * * *

The statement of October 13, 1952, to which the President referred in that letter, was made at New Orleans. It is set out in full in the *New York Times*, Oct. 14, 1952, p. 26; it contained nothing further of importance on the present issues. The statement of October 14, 1952, was made at Houston and is set out in the *New York Times*, Oct. 15, 1952, p. 24. In addition to the language quoted by the President in his letter, *supra*, it contained the following with reference to the present subject:

That fighting spirit has been shown at its best in Price Daniel's valiant defense of the rights of your state in its own tidelands.

He thinks the Texas tidelands ought to belong to Texas. So do I.

As I said last night at New Orleans, this has been my position since I first looked into this matter in 1948 long before anybody persuaded me to go into politics. I have always felt that the titles to these submerged lands should be recognized in the states out to their historic boundaries.

Not just Texas—all the states. Not just tidelands—all submerged lands within such historic boundaries.

The Supreme Court has said that Congress has authority to confirm title to these properties in the states. Congress has twice tried to do so. The President has twice vetoed that effort.

My opponent says he agrees with these vetoes. I do not.

At Fort Worth, on October 15, 1952, General Eisenhower made another reference to this subject (*New York Times*, Oct. 16, 1952, p. 22):

Yesterday morning I tried to correct and clear up some of the confusion that I hear is in the minds of some of our opposition. They said they did not know where I stood on the tidelands.

If I failed to make it clear yesterday, then they simply refuse to understand the English language.

Because, as I said in 1948 at a dinner in this city, I still believe in the sanctity of contracts and agreements and I still believe Texas owns her own property.

At Shreveport, Louisiana, on October 15, 1952, General Eisenhower again mentioned the question (*New York Times*, Oct. 16, 1952, p. 22):

We have gotten into the habit under the leadership of Washington of passing all problems to Washington, and Washington in turn stretches its long nose further and further into our business. Good government will oppose this tendency; it will oppose it in the tidelands. It will say, "the states have traditionally owned these areas, and we are not going to try to get the Federal Government in them to seize them merely because someone suddenly discovered they are valuable."

The statements made by Attorney General Brownell, to which the President refers in his letter of April 24, 1953, were in the course of his testimony before the Senate committee considering the Submerged Lands Act (Senate Interior Committee Hearings on S. J. Res. 13, 83d Cong., 1st Sess.):

The States should have the right to administer the development and removal of natural resources landward of a line running along their historic boundaries and to retain the income therefrom. The lands beyond that line should be developed under the exclusive supervision and control of the Federal Government with all income therefrom going to the benefit of the entire country.

* * * * *

There are a number of things I should like to suggest concerning the legislation which have a special importance to the Department of Justice.

First: For the purpose of minimizing constitutional questions, I consider it of primary importance that any statute combine a program (*a*) au-

thorizing the States to administer and develop the natural resources from the submerged lands within a line marking their historic boundaries with (*b*) specific authorization to the executive branch of the Federal Government to develop the lands outside of that line, with the income therefrom going to the entire Nation. * * *

My recommendation would mean, in legal terms, that instead of granting to the States a blanket quitclaim title to the submerged lands within their historic boundaries, the Federal Government would grant to the States only such authority as required for the States to administer and develop the natural resources. * * *

Second: An actual line on a map dividing the two areas of submerged lands should be drawn by Congress in the bill to eliminate much expensive and unnecessary litigation. If the statute merely refers in words to "historic boundaries" or in words describes a line beginning at the edge of the States' inland waters or tries to describe in words bays or other characteristics of the coast, unnecessary litigation will almost surely result. Therefore, we make this suggestion of an actual line on a map drawn as part of the bill, which would eliminate also, we think, certain international problems that might otherwise arise if territorial-ownership claims are asserted in the States or Federal Government beyond their historic 3-mile limit. [Pages 925-926.]

* * * * *

Senator ANDERSON. * * *

The first question is naturally going to be on this matter of historic boundaries. Do I understand your suggestion to be that Congress should draw a line as to where these historic boundaries might be?

Attorney General BROWNELL. For the purpose of administering the resources, that is correct, Senator.

* * * * * *

Attorney General BROWNELL. Our thought generally, Senator, without going into great detail, is that this line would be 3 miles out, except in the case of Texas and the west coast of Florida.

Senator ANDERSON. Out from what?

Attorney General BROWNELL. The traditional 3-mile limit would be an accurate description. [Page 931.]

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Attorney General BROWNELL. * * * We believe that the Supreme Court has made it clear that this is a matter of congressional policy. * * * It is up to you to decide in the first instance where you want that line drawn * * *. [Page 932.]

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Senator ANDERSON. The problem of the regulation of these lands where the 3-mile limit is passed, does get into international law to some degree, does it not?

Attorney General BROWNELL. Oh, yes. That does not mean it is not within the power of Congress to act on it, however.

* * * * * *

Senator ANDERSON. Mexico is seizing shrimp boats that are not within the 3-mile limit but are within their 10-mile limit. This Government is contending that they cannot do that.

Attorney General BROWNELL. Yes, that is right. * * * [Page 937.]

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Senator HOLLAND. * * *

Now, might I ask you about this question of drawing a line. Where a constitution of a State draws a line, that would be the line which you think the statute which is proposed here should cover as the outside line of the State, provided that the constitution has been approved by the Federal Congress? Is that what you have in mind?

Attorney General BROWNELL. In order that there may be no misunderstanding, generally speaking what we have in mind is the 3-mile line, except for the coasts of Texas and the west coast of Florida, where 3 leagues would generally prevail.

Senator HOLLAND. The reason you make those two exceptions is because it is your understanding that the constitutions of Texas and Florida provide that the 3-league off-shore limit is the limit

clear across Texas and along the west coast of Florida in the Gulf of Mexico?

Attorney General BROWNELL. That, plus the action of the Congress in relation to it. [Page 957.]

Thus the President has expressed the opinion that the historic boundary of Texas was three leagues from the coast and that was his view as to the facts. He recognizes that it is for the Court to determine the extent of the grant made by Congress under the Submerged Lands Act. That Act, as passed, makes a grant limited to State boundaries but does not itself indicate what those boundaries are; the issue of boundaries is left for judicial determination (*supra*, pp. 31-58).

Attorney General Brownell, advising as to techniques for accomplishing whatever grant Congress decided to make, pointed out that there would be international complications in any attempt to make a territorial grant beyond the three-mile limit. He advised that any such grant should be in the form of a mere transfer of the right to control exploitation within such area as Congress chose, to be identified by delineation on a map rather than verbally in terms of "boundary". Since the United States claims, as against other nations, the right to control exploitation of the continental shelf, it could delegate to the States any portion of such control without regard to the location of State boundaries. The Attorney General pointed to the long-continued claims of Texas and Florida as reasons which might move Congress to delegate control to those States within the areas they had claimed. Congress, however, rejected the idea of giving those States rights in any specific area beyond the three-mile limit, deciding instead to limit all States to their boundaries as they

actually were, not as they had been claimed to be. That congressional decision is of course binding on the Court, the States, and the Federal Government.

IV

THE ANSWER OF THE STATE OF MISSISSIPPI TO THE AMENDED COMPLAINT RAISES NO GENUINE ISSUE AS TO ANY MATERIAL FACT, AND IS INSUFFICIENT IN LAW

The Separate Answer of the State of Mississippi to the Amended Complaint asserts essentially four defenses. First, it alleges that Mississippi when it entered the Union had a boundary six leagues from shore in the Gulf of Mexico, and that consequently it is entitled under the terms of the Submerged Lands Act to the submerged lands and resources extending three leagues into the Gulf (Pars. II-VI, pp. 1-6). Second, Mississippi denies that the United States is entitled to any accounting for sums of money derived from submerged lands or resources of the Gulf of Mexico (Pars. V-VI, pp. 4-5). Third, Mississippi apparently alleges that the Submerged Lands Act specifically acknowledged and confirmed in the State the ownership of the submerged lands to a distance of three leagues in the Gulf of Mexico (Par. VI, pp. 5-6). Fourth, Mississippi alleges that, regardless of the location of its boundary, the Submerged Lands Act entitles it to the natural resources underlying the Gulf within three leagues of the coast (Par. VIII, p. 7). Mississippi also denies the allegation of the United States that "the fundamental question in issue is the width of the marginal sea within the jurisdiction of the United States, which involves inquiry into and application of the foreign policy of the United States," and alleges

that the issues are wholly internal (Par. VII, pp. 6-7). Mississippi appears to make no claim independently of the Submerged Lands Act, and does not claim the submerged lands or resources more than three leagues from the coast, although it denies altogether its liability to account for sums derived from any submerged lands or resources.

A. WHEN MISSISSIPPI BECAME A MEMBER OF THE UNION IT DID NOT HAVE A BOUNDARY EXTENDING MORE THAN THREE MILES INTO THE GULF OF MEXICO

Mississippi claims to have entered the Union with a boundary extending six leagues into the Gulf of Mexico, under the terms of the Mississippi Enabling Act, the Mississippi Constitution of 1817, and the resolution admitting Mississippi to the Union. Section 2 of the Mississippi Enabling Act of March 1, 1817, 3 Stat. 348 (Appenrix A, *infra*, pp. 326-327), provided:

> That the said state shall consist of all the territory included within the following boundaries, to wit: * * * to the north-west corner of the county of Washington [Alabama], thence due south to the Gulf of Mexico, thence westwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl river with Lake Borgne, thence up said river * * *.

The same description was repeated in the preamble of the Mississippi Constitution of August 15, 1817, submitted to Congress pursuant to the Enabling Act. Miss. Rev. Code (Poindexter, 1823), p. 539; Miss. Code (Hutchinson, 1848), p. 23; H. Doc. No. 2, 15th Cong., 1st Sess., p. 5. By resolution of December 10, 1817, 3

Stat. 472, Congress declared the Mississippi constitution and government to be republican, and admitted the State into the Union, without redescribing its boundaries.

Mississippi's claim rests upon the expression, "including all the islands within six leagues of the shore." We have already explained, in connection with Louisiana's similar claim, our reasons for believing that such language was used only to identify islands, and not to describe an area of water and submerged land (*supra*, pp. 172-177). We shall not repeat that discussion here. We believe, however, that the congressional action regarding Mississippi gives added force to our position. It will be noted that whereas Louisiana, in 1812, was given islands within three leagues of the coast, Mississippi, in 1817, was given the islands within six leagues of the shore.[80] If Congress had intended its language to be a description of a maritime belt, it would have been extraordinary to find it fixing a different belt for Mississippi from that so recently fixed for Louisiana,

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[80] The "shore" is the line where the sea meets the land, in all its sinuosities, commonly taken at the line of mean low water. In the most precise modern usage, the "coast" comprises the shore where the shore meets the open sea, and the outer limit of inland waters, where inland waters meet the sea. See, *e.g.*, Sec 2(c) of the Submerged Lands Act, 43 U.S.C., Supp. V, 1301(c), Appendix A, *infra*, p. 334. In common usage, the two terms are often synonymous, and it seems certain that Congress did not intend to make any distinction between them in the Acts admitting Louisiana to the Union in 1812 and Mississippi in 1817. Although the Chandeleur Islands, and lines drawn between them, may be considered the seaward limit of inland waters and, therefore, to form the eastern "coast" of Louisiana in the strict sense just mentioned, this Court in *Louisiana* v. *Mississippi*, 202 U.S. 1, 47, concluded that the St. Bernard marshes of the mainland formed, in that area, the "coast" referred to in the Louisiana Enabling Act. That is to say, "coast" in that Act was used in the sense of "shore." This seems to be a necessary interpretation of the Act.

and particularly to find it enlarging that belt from three leagues to six at the very time when American insistence on three miles as the maximum permissible limit of maritime jurisdiction was crystalizing (*supra*, pp. 59-65). This consideration strongly corroborates the view that the language used means only what it says, that the States were to include *islands* situated within the designated distances from the mainland. It is hard to think of a more apt way to express that precise idea.

As in the case of Louisiana (*supra*, p. 177), we need not consider whether the language, "including the islands" etc., would of itself include the water area intervening between the islands and the mainland (though we believe that it would not), because it happens that all the water so situated in Mississippi is in Mississippi Sound, which this Court has described as inland water. *Louisiana* v. *Mississippi*, 202 U. S. 1, 48. The bed of these inland waters passed to the State on its entry into the Union. *Pollard's Lessee* v. *Hagan*, 3 How. 212. Also, we agree that Mississippi has a marginal belt extending three miles seaward from the islands marking the outer limit of the inland waters of Mississippi Sound, under the ordinary application of the three-mile rule. Thus, the only practical issue between the United States and Mississippi is whether the statutory expression, "including all the islands within six leagues of the shore," described a water area (containing no islands) extending more than three miles seaward of the outermost islands off Mississippi. For the reasons stated, we submit that it did not.

B. THE UNITED STATES IS ENTITLED TO AN ACCOUNTING FOR ANY SUMS DERIVED BY MISSISSIPPI AFTER JUNE 5, 1950, FROM THE DISPUTED AREA

Mississippi denies that the United States is entitled to an accounting for any sum derived by the State at any time from the submerged lands of the Gulf of Mexico. Separate Answer of the State of Mississippi to Amended Complaint, Pars. V-VI, pp. 4-5.

In *United States* v. *Louisiana*, 340 U.S. 899, and *United States* v. *Texas*, 340 U.S. 900, the Court required those States to account for sums derived by them from the bed of the Gulf of Mexico after June 5, 1950, the date of the opinions in those cases. Those opinions made it so clear that the Federal Government was entitled to the seabed as against any State whatever, that it is fair to say that all States were thereby put on notice of the federal claim and should be held accountable for sums derived by them after the same date. At the very least, however, the principle which entitled the United States to an accounting from the date of decision in those cases must likewise entitle it to an accounting from the date of decision in the present case.

The Submerged Lands Act has released the Government's claim for an accounting as to sums derived from part of the seabed, but not from all of it. As we have shown (*supra*, pp. 31-47), Section 3(a) and 3(b)(1) of the Submerged Lands Act granted the States the submerged lands only within their boundaries and not more than three leagues from the coast in the Gulf of Mexico. 43 U.S.C., Supp. V, 1311(a), 1311(b)(1), Appendix A, *infra*, p. 335. Section 3(b)(2) released "all claims of the United States, if any it has, for money or damages arising out of any operations of said States or

persons pursuant to State authority upon or within *said* lands and navigable waters" (emphasis added), 43 U.S.C., Supp. V, 1311(b)(2), Appendix A, *infra*, p. 335. This clearly refers to the submerged lands granted to the States by the subsections immediately preceding. That was brought out by Senator Cordon's presentation of the measure in the Senate. Section 3(b)(3) provides for repayment to the States of money received by the United States under State-issued leases of "such lands." 43 U.S.C., Supp. V, 1311(b)(3), Appendix A, *infra*, pp. 335-336. The reference to "such lands" is obviously the same as "said lands" in the subdivision immediately preceding; Senator Cordon said of subsection (3):

> * * * I must say that applies only to funds which have been paid with respect to operations inside the State boundaries. A portion has been paid from operations outside or seaward of the State boundaries. As to those funds, this joint resolution does not affect them in any way. [99 Cong. Rec. 2694.]

Similarly, the Act does not affect the Government's claims against the States for operations in areas retained by the United States. It is for sums realized from operations in such areas that the United States now seeks an accounting.

C. MISSISSIPPI'S OTHER DEFENSES ARE NOT VALID

Mississippi makes three other contentions which are also answered by what we have said with respect to claims of other defendant States.

1. THE SUBMERGED LANDS ACT DID NOT GRANT THE SUBMERGED LANDS FOR A DISTANCE OF THREE LEAGUES ABSOLUTELY

Mississippi alleges that the Submerged Lands Act "specifically acknowledged and confirmed in the State of Mississippi ownership of the submerged lands and resources beneath its navigable waters as defined in Section 2 of said Submerged Lands Act, within three marine leagues from its coast line * * *." Separate Answer of the State of Mississippi to Amended Complaint, Par. VI, p. 6. If this means only that the Act established the State's right to the submerged lands and resources within the State boundary and not more than three leagues from the coast, we agree. However, if it means that the Act recognized the State's rights as extending for a distance of three leagues absolutely, we disagree. As we have already explained (*supra*, pp. 51-58), the Act neither changes nor declares the location of any State boundary in the Gulf of Mexico, and does not make any absolute grant to a distance of more than three miles from the coast. The extent of the grant, beyond three miles, depends upon a demonstration that the State actually had a boundary more than three miles from the coast when it entered the Union, or approved by Congress before May 22, 1953.

2. THE SUBMERGED LANDS ACT DID NOT GRANT RIGHTS IN SUBMERGED LANDS OR RESOURCES SEAWARD OF STATE BOUNDARIES

Mississippi alleges that, even if its boundary does not extend three leagues from the coast and it does not have title to the submerged lands and minerals to that distance, still it is entitled to exclusive rights in the na-

tural resources to that distance, under the terms of the Submerged Lands Act. Separate Answer of the State of Mississippi to Amended Complaint, Par. VIII, p. 7. We have already shown the fallacy of such a contention (*supra*, pp. 186-187).

3. THIS CASE DOES INVOLVE INQUIRY INTO AND APPLICATION OF THE FOREIGN POLICY OF THE UNITED STATES REGARDING THE WIDTH OF THE MARGINAL SEA

Mississippi denies that the fundamental question in issue is the width of the marginal sea within the jurisdiction of the United States, involving inquiry into and application of the foreign policy of the United States. Separate Answer of the State of Mississippi to Amended Complaint, Par. VII, pp. 6-7. We have already explained why, although the present controversy is wholly domestic, its decision will necessarily be controlled by the national foreign policy as to the width of the marginal sea. *Supra*, pp. 147-151.

V

THE ANSWER OF THE STATE OF ALABAMA TO THE AMENDED COMPLAINT RAISES NO GENUINE ISSUE AS TO ANY MATERIAL FACT, AND IS INSUFFICENT IN LAW

The Answer and Cross-bill of the State of Alabama to the Amended Complaint alleges that Alabama had a boundary in the Gulf of Mexico six leagues from the coast before and when it entered the Union and as approved by Congress in 1868, and that consequently it is entitled to the submerged lands and resources for a distance of three leagues under the Submerged Lands Act. The prayer is for a judgment that the State has a boundary six leagues from the coast and is entitled to the submerged lands and resources for three leagues.

The present discussion deals with that pleading in its character as an answer. It is also denominated a cross-bill (p. 7), and the United States has moved for its dismissal as such. The argument in support of that motion appears under Point VII, *infra*, pp. 317-319.

Under the original complaint and this Court's order of June 24, 1957, 354 U.S. 515, the State on August 15, 1957, filed the Intervention of the State of Alabama. That intervention took the form of a statement of a claim to the submerged lands and resources within three leagues of the coast of Alabama, followed by an answer to the original complaint. We assume that that pleading is superseded by the Answer and Cross-bill of State of Alabama to the Amended Complaint. However, the Intervention made two contentions that are not repeated in the answer to the amended complaint, and in case the State still intends to rely on them, we refer here to our discussions of those points as advanced by Louisiana. First, the Intervention of the State of Alabama alleged (Par. V, p. 6) that the Submerged Lands Act entitled Alabama to the submerged lands and resources for a distance of three leagues even if its boundary did not extend so far. We have discussed that contention, *supra*, pp. 186-187. Second, the Intervention of the State of Alabama alleged that the controversy is wholly internal and does not concern foreign nations (Par. IX, p. 7). We have discussed that contention, *supra*, pp. 147-151.

A. ALABAMA HAS NEVER HAD A BOUNDARY THREE LEAGUES FROM THE SHORE

Alabama's claim to a boundary three leagues from the shore rests on the fact that Alabama traditionally has been described as "including all the islands within six leagues of the shore." That description appeared

in Section 1 of the Organic Act for Alabama Territory, March 3, 1817, 3 Stat. 371, Appendix A, *infra,* pp. 327-328. It was repeated in Section 2 of the Alabama Enabling Act of March 2, 1819, 3 Stat. 489, 490, Appendix A, *infra,* pp. 328-329, and in the Preamble of the Alabama Constitution of August 2, 1819, adopted thereunder, Dig. Ala. Laws (Toulmin, 1823) 914, 1 Ala. Code (1907) 63.[81] The same language appeared in Article II, Section 1, of the Alabama Constitution of 1868, Ala. Code (Keyes, Wood & Roquemore, 1876) 104, 1 Ala. Code (1907) 128, adopted under the Reconstruction Acts and with which Alabama was readmitted to representation in Congress following the Civil War. Act of June 25, 1868, 15 Stat. 73, Appendix A, *infra,* pp. 331-333.

We have already explained that boundaries existing prior to statehood are not a basis for rights under the Submerged Lands Act (*supra,* pp. 47-51). We explain hereafter that the readmission of States to representation in Congress after the Civil War was not a congressional approval of boundary provisions then contained in their constitutions (*infra,* pp. 263-313). However, neither of those points is important so far as Alabama is concerned, for its boundary as a territory and in 1868 was described in the same way as it was when the State entered the Union in 1819. Since the State is clearly entitled to the benefit of whatever boundary it had when it entered the Union (there having been no intervening diminution), the State's claim would gain no added force by repetitions of the same boundary at other times

[81] Alabama was admitted to the Union by Resolution of December 14, 1819, 3 Stat. 608, which contained no description of the State.

even if they were material under the Submerged Lands Act.

The essential fallacy of Alabama's case is that the description of the State as "including all islands within six leagues of the shore" did not mean that all waters and submerged lands within that distance were also included. We have already discussed that point with reference to the similar claims of Louisiana (*supra*, pp. 172-178) and Mississippi (*supra*, pp. 252-254); Alabama's situation is no different. As in the case of those States, the water between the islands and the Alabama mainland is inland water; consequently, we do not question that the land under it belongs to the State. See *supra*, pp. 177, 254. Likewise we agree that the State is entitled, under the Submerged Lands Act, to the submerged lands within three miles seaward from the islands, and from the eastern part of the mainland where there are no islands. The practical issue is as to the submerged lands more than three miles seaward from the islands or more than three miles seaward from the open coast.

VI

THE ANSWER OF THE STATE OF FLORIDA TO THE AMENDED COMPLAINT RAISES NO GENUINE ISSUE AS TO ANY MATERIAL FACT, AND IS INSUFFICIENT IN LAW

Florida asserts five defenses to the fifth cause of action of the Amended Complaint. The first defense consists only of denials of certain essential allegations of the Amended C mplaint and denial of the State's obligation to account for money "received from or relating to the lands, minerals or other things underlying the 'coast line' of Florida as defined in and by subsection (c) of section 1301, title 43, of the United

States Code."[82] Defenses [of Florida] to Amended Complaint, pp. 2-3. It makes no affirmative allegations. We believe that (apart from Florida's affirmative defenses) the allegations of the Amended Complaint, which the First Defense merely denies, are fully supported by the argument under Point I, *supra*, pp. 27-151, and no further discussion is necessary here. We turn to the other four defenses Florida asserts.

A. CONGRESS HAS NOT APPROVED A BOUNDARY FOR FLORIDA EXTENDING MORE THAN THREE MILES INTO THE GULF OF MEXICO

Florida's second defense is that in 1868 Congress approved the boundary of Florida as extending three leagues into the Gulf of Mexico, by approving the constitution which Florida submitted to Congress in that year pursuant to the Act of March 2, 1867. Defenses [of Florida] to Amended Complaint, pp. 3-4. Article I of the Florida Constitution of 1868 described the boundary of the State as being "three leagues from the land" in the Gulf of Mexico.[83] The defense

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[82] The United States has asked for an accounting of all sums derived by Florida after June 5, 1950, from submerged lands and resources lying more than three miles seaward from the low-water mark and from the outer limit of inland waters. Amended Complaint, pp. 17-18.

[83] "The boundaries of the State of Florida shall be as follows: Commencing at the mouth of the river Perdido; from thence up the middle of said river * * * to the head of the St. Mary's river; then down the middle of said river to the Atlantic ocean; thence southeastwardly along the coast to the edge of the Gulf Stream; thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land, to a point west of the mouth of the Perdido river; thence to the place of beginning." Fla. Laws (1868) 193, 195; 25 Fla. Stats. Anno. 411, 413. See Appendix A, *infra*, p. 431.

apparently is intended to bring the State within the provisions of Sections 2(a), 2(b), 3(a) and 3(b) of the Submerged Lands Act, 43 U.S.C., Supp. V, 1301(a), 1301(b), 1311(a) and 1311(b), by which Congress gave to the States the submerged lands within their boundaries theretofore approved by Congress, extending not more than three leagues into the Gulf of Mexico. The United States agrees that from 1868 to the present day Florida by its constitutions has claimed a boundary extending three leagues into the Gulf of Mexico. Constitution of 1868, Art. I, Fla. Laws (1868) 193, 195, 25 Fla. Stats. Anno. 411, 413, Appendix A, *infra*, p. 341; Constitution of 1885, Art. I, 1 Fla. Stats. (1955) 1, 3, 25 Fla. Stats. Anno. 449, 717. However, the United States denies that the boundary so claimed has ever been approved by Congress.

Florida relies on the Act of June 25, 1868, 15 Stat. 73, as having approved its boundary as described in the Florida Constitution of 1868. We shall show that that statute did not approve the provisions of the Florida Constitution; it merely recited that Florida and certain other States had adopted constitutions which were republican, and provided that they should be admitted to representation in Congress. The fact that its only operative effect was to admit the States to representation has been recognized by this Court. The legislative history of the act shows that the boundary provision contained in the Florida constitution was never mentioned, and that the debates, both as to Florida and as to the other States admitted to representation by the same act, were confined to considering whether the constitutions had been duly adopted and were republican and, in a few instances, whether par-

ticular provisions violated the Federal Constitution. When provisions of the Florida constitution were objected to on other grounds, the objection was brushed aside as not being a proper concern of Congress. Preliminary to the act just mentioned was the Act of March 2, 1867, 14 Stat. 428, as amended and supplemented by the Acts of March 23, 1867, 15 Stat. 2, July 19, 1867, 15 Stat. 14, and March 11, 1868, 15 Stat. 41. That act, as amended, provided that when any of the States lately in rebellion should, in the specified manner, adopt a constitution which was republican and in conformity to the Federal Constitution, and it should be approved by Congress, the State should be readmitted to representation in Congress. The congressional debates show that the "approval" there referred to meant only approval of the State's compliance with the affirmative requirements of the Act, with Congress reserving the power to disapprove, if it saw fit, other provisions that might be considered unconstitutional or non-republican. If that 1867 Act anticipated (as we think it did not) affirmative congressional approval of every provision of every State constitution, Congress departed from that plan when the time came, and admitted the States to representation in Congress without any such comprehensive approval of their constitutions. The only specific mention of State boundaries in the debates on the Reconstruction Acts showed an understanding that they were to remain unchanged. The terms and history of the acts admitting other southern States to representation in Congress corroborate this view and show a complete lack of any intention to approve the terms of the State constitutions, beyond finding as a basis for action that they were duly adopted and were republican.

I. IN TERMS, THE ACT OF JUNE 25, 1868, MERELY ADMITTED FLORIDA TO REPRESENTATION IN CONGRESS

The act of Congress to which Florida refers as having constituted approval of the three-league boundary claim is the Act of June 25, 1868, 15 Stat. 73, Appendix A, *infra*, pp. 331-333, which provided for the readmission of Florida and five other southern States to representation in Congress following the Civil War. However, that Act made no specific reference to any boundary claim, and did not express approval of the State constitutions beyond reciting in its preamble that they had been duly adopted and were republican. Its relevant provisions were as follows:

> Whereas the people of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida have, in pursuance of the provisions of an act entitled "An act for the more efficient government of the rebel States," passed March second, eighteen hundred and sixty-seven, and the acts supplementary thereto, framed constitutions of State government which are republican, and have adopted said constitutions by large majorities of the votes cast at the elections held for the ratification or rejection of the same: Therefore,
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> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That each of the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, shall be entitled and admitted to representation in Congress as a State of the Union when the legislature of such State shall have duly ratified the amendment to the Constitution of the United States proposed by the

Thirty-ninth Congress, and known as article fourteen, upon the following fundamental conditions: That the constitutions of neither of said States shall ever be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State, who are entitled to vote by the constitution thereof herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: *Provided,* That any alteration of said constitution may be made with regard to the time and place of residence of voters; and the State of Georgia shall only be entitled and admitted to representation upon this further fundamental condition: that the first and third subdivisions of section seventeen of the fifth article of the constitution of said State, except the proviso to the first subdivision, shall be null and void, and that the general assembly of said State by solemn public act shall declare the assent of the State to the foregoing fundamental condition.[84]

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[84] The remainder of the Act consisted of Section 2, making alternative provision for the time of first meeting of the legislatures, and Section 3, providing that Section 1 should take effect as to each State when it ratified the Fourteenth Amendment (and, in the case of Georgia, agreed to the fundamental condition imposed by the proviso to Section 1), directing that State officers then be promptly inaugurated if eligible under the Fourteenth Amendment, and requiring the President to proclaim when each State ratified that amendment. Appendix A, *infra*, pp. 331-333.

Representatives of North Carolina, South Carolina, Louisiana, Alabama and Florida were subsequently admitted to Congress without further legislation, but because of difficulties arising in Georgia, Congress passed the Act of December 22, 1869, 16 Stat. 59, "to promote the Reconstruction of the State of Georgia," pur-

On its face, this had only one operative effect: to provide that representatives of the named States should be readmitted to Congress, upon certain conditions. The conclusion that this Act merely provided for representation of the States in Congress and had no other effect, either as approval of State constitutional provisions or otherwise, is required by the specific statutory terms. As shown above, the enacting clause contained no expression of approval of the constitutions. The only such expression occurred in the preamble, and was limited to a recital that the constitutions had been duly adopted and were republican. As this Court has said, "the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous." *Yazoo Railroad Co.* v. *Thomas,* 132 U.S. 174, 188. There is nothing doubtful or ambiguous about the congressional declaration that, upon certain conditions, the named States should be admitted to representation in Congress. Consequently, the preamble cannot be resorted to to affect the meaning of the act. Moreover, the expression in the preamble is only in the form of a recital —a mode of expression not ordinarily understood as having operative effect. *Cf. Kinkead* v. *United States,* 150 U.S. 483, 497; *Blacklock* v. *United States,* 208 U.S. 75, 85. Finally, even if the introductory recital were to be taken as an operative enactment, it said no more than that the constitutions were duly adopted and were republican. At the most, that shows only approval of the form of government adopted and the procedure fol-

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suant to which Georgia was declared entitled to representation in Congress by the Act of July 15, 1870, 16 Stat. 363. See Cong. Globe, 41st Cong., 2d Sess., 1701-1703. Those acts did not relate to the Georgia constitution and are not material here.

lowed in adopting it; it does not even remotely suggest that Congress considered and approved all the numerous provisions contained in all the constitutions referred to.

2. AS JUDICIALLY CONSTRUED, THE ACT OF JUNE 25, 1868, MERELY ADMITTED FLORIDA TO REPRESENTATION IN CONGRESS

In the past, this Court has refused to attribute to the 1868 Act any broader effect than mere admission of the States to representation in Congress. Soon after the statute was enacted, the Court expressed its understanding that Congress had not thereby approved the provisions of the State constitutions. The Georgia constitution contained a provision that the State courts should not have jurisdiction of suits on debts for which the consideration had been a slave or slaves or the hire thereof. That was the proviso to the first subdivision of Article V, Section 17, expressly excepted by Congress, *supra,* from the general nullification of that subdivision.[85] S. Exec. Doc. No. 57, 40th Cong., 2d Sess., 14. In *White* v. *Hart,* 13 Wall. 646, that proviso was held to be void, as violative of the constitutional prohibition of State impairment of the obligations of contracts. The Court rejected the contention that Georgia's constitution had been dictated by Congress, which is not subject to such a prohibition. The Court held (13 Wall. at 649) that the constitution "was submitted to Congress as a voluntary and valid offering, and was so received and so recognized in the subsequent action of that body." The Court then implied that Congress had not approved the provision, stating:

[85] See *infra,* pp. 271-279.

> We may add, that if Congress had expressly dictated and expressly approved the proviso in question, such dictation and approval would be without effect. Congress has no power to supersede the National Constitution.

That dictum is particularly striking in that it concerned the proviso which Congress expressly excepted from the general nullification of the subsection in which it occurred, so that there was greater reason to say of that proviso than of any other part of the six State constitutions then before Congress that it had in fact received congressional approval. If a provision so singled out and preserved by Congress was not thereby approved, then *a fortiori* there was no approval of a provision such as the Florida boundary claim which was never mentioned in the debates or in the act of Congress.

In the following year, this Court even more explicitly declared that the Act of June 25, 1868, had no effect whatever beyond providing that congressmen and senators from the States affected should be admitted to Congress. In *Gunn* v. *Barry*, 15 Wall. 610, the Court held void, as to prior creditors, enlarged exemptions from execution provided by the Georgia constitution of 1868. Again, the Court rejected the contention that the provision had been validated by Congressional approval. It said (15 Wall. at 623):

> Though her [Georgia's] constitution was sanctioned by Congress, this provision can in no sense be considered an act of that body. The sanction was only permissive as a part of the process of her rehabilitation, and involved nothing affirmative or negative beyond that event.

To the same effect is *Butler* v. *Thompson*, 97 F.Supp. 17, 20 (E.D. Va.), affirmed *per curiam*, 341 U. S. 937, where Judge Dobie, speaking for a three-judge district court, said of an alleged violation by Virginia of the restrictions which the 1868 Act imposed on the State's power to change qualifications for voting, "Such a matter is one peculiarly within the domain of Congress itself, since it only purports to set up a condition governing Virginia's right *to admission to representation in Congress.*" (Emphasis by the court.)

3. THE LEGISLATIVE HISTORY OF THE ACT OF JUNE 25, 1868, SHOWS NO INTENTION TO APPROVE STATE CONSTITUTIONAL PROVISIONS SUCH AS THE FLORIDA BOUNDARY DESCRIPTION

A reading of the congressional debates on the Act of June 25, 1868,[86] likewise makes it clear that Congress was not passing on and approving everything contained in all the State constitutions submitted to it under the Reconstruction Acts. While opponents of the constitutions raised many objections to them, those objections chiefly concerned the question of whether the governments established were republican.[87] Most of them related in one way or another to the extent to which the governments would be subject to popular control. Among the subjects so discussed were suffrage (Cong. Globe, 40th Cong., 2d Sess., 2446, 2448, 2449, 2462, 2465,

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[86] H.R. 1058, 40th Cong., 2d Sess. Cong. Globe, 40th Cong., 2d Sess., 2412-2413, 2445-2456, 2461-2466, 2498-2499, 2858-2860, 2861-2872, 2895-2900, 2901-2904, 2927-2935, 2963-2970, 2998-3022, 3023-3029, 3052, 3090-3097, 3466, 3484-3485, App. 314-316, 329-338, 347-354.

[87] Article IV, Section 4 of the Constitution requires the United States to "guarantee to every State in this Union a Republican Form of Government * * *."

3016, 3095, App. 315), procedures for constitutional amendment (*id.* 3091), apportionment of legislators (*id.* 3090-3091), appointive power of the governor (*id.* 3090-3096), martial law, maintenance of standing armies, and suspension of operation of the laws (*id.* 2448, App. 314-315). There was also discussion of the extent to which civil and political rights were protected (*id.* 2413, 2462) and jury trial preserved (*id.* 2448, App. 314-315).

Although various provisions of the State constitutions were criticized by opponents of the measure, the only ones actually disapproved by Congress were the first and third subdivisions of Article V, Section XVII, of the constitution of Georgia, except the proviso to the first subdivision. Act of June 25, 1868, Section 1, proviso, *supra*, pp. 266, 268. The first of those subdivisions would have deprived the State courts of jurisdiction of suits against residents of Georgia on contracts made before June 1, 1865, except in enumerated classes of cases or as the legislature might permit by law. To that was attached the proviso, preserved by Congress, that the legislature should not give jurisdiction as to any debt for which the consideration had been a slave or slaves or the hire thereof. The third subdivision, disapproved by Congress, would have permitted the legislature, subject to certain restrictions, to levy a 25% tax on debts created before June 1, 1865, chargeable to the creditor but reimbursable as to one half by the debtor. S. Exec. Doc. No. 57, 40th Cong., 2d Sess., 14-15. As originally reported, the 1868 bill made no reference to those provisions, but the House adopted an amendment, introduced by Thaddeus Stevens of Pennsylvania, invalidating the first subdivision as to

debts owed to Union adherents.[88] Cong. Globe, 40th Cong., 2d Sess., 2465. That this did not reflect an attitude of exercising a general supervision over the constitutional provisions is made clear by the following statement, made by Mr. Stevens himself immediately before the vote adopting his amendment (*ibid.*):

> Now, sir, what is the particular question we are considering? Five or six States have had submitted to them the question of forming constitutions for their own government. They have voluntarily formed such constitutions, under the direction of the Government of the United States. They have sent those constitutions here * * *. We have looked at them; we have pronounced them republican in form; and all we propose to require is that they shall remain so forever. Subject to this requirement, we are willing to admit them into the Union.

The amended version reported by the Senate committee contained the proviso to Section 1 in its final form. The Senate debate on an unsuccessful motion to delete that part of the proviso imposing the condition on the State of Georgia shows a general understanding that the primary concern of Congress was as to whether the constitutions were republican, but that Congress might also appropriately reject provisions that were plainly unconstitutional for other reasons.[89]

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[88] Mr. Stevens' amendment referred specifically to the Georgia provision and also to "similar provisions in the other constitutions" then under consideration. In fact, none of the others had similar provisions, and the act as passed makes no such general reference.

[89] Section 5 of the Act of March 2, 1867, 14 Stat. 428, 429, pursuant to which the State constitutions were adopted and submitted to Congress, provided "That when the people of any one of said

The only disagreement was as to whether these particular provisions of the Georgia constitution were so plainly unconstitutional as to make congressional disapproval advisable, in view of the fact that there would be a judicial remedy available in any case. Thus, Senator Sherman of Ohio, who made the unsuccessful motion to delete the condition imposed on Georgia, said in support of his motion:

> * * * All previous fundamental conditions imposed upon a State being admitted into the Union have been upon one of two grounds, either that the clause in the State constitution objected to was in violation of the Constitution of the United States, or that it affected some great, material right, without which the government would not be republican in form. [Cong. Globe, 40th Cong., 2d Sess., 2968.]
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> * * * When we go beyond securing the enforcement of the guaranty of republican government, which we have the power to do, when we undertake to legislate for them upon matters on which they have passed, we transcend our bounds.
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> I know that Senators may say that this relief clause would affect or tend to affect that clause of the Constitution of the United States which says that no State shall impair the obligation of a contract. If that provision of the Constitution of

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rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects," etc., the States should be readmitted to representation in Congress. That act is discussed at pages 284-311, *infra*.

the United States is affected at all by this clause of the constitution of Georgia, the latter clause is entirely null. If the courts of the United States hold that this clause does impair the obligation of contracts within the meaning of the Constitution of the United States, what business have we with it here? It is a matter for the courts to pass upon. * * * [*Id.* 2969.]

Other Senators, agreeing with the principle involved, expressed various views on its application to the particular question of the Georgia constitutional provision:

Mr. WILLIAMS [of Oregon]. * * *

* * * If I understand the reconstruction laws it is not necessarily the duty of Congress to revise the constitution of every one of these States, and if, in the judgment of Congress, some clause be found there which may be regarded as in contravention of the Constitution of the United States, to strike out that clause and revise and amend the constitution and make it in entire conformity to our views of law or expediency, because if we assume to pursue that course we might just as well have made these constitutions at the beginning and sent them down there with instructions to the people to adopt them as the constitutions of the several States. It seems to me, as this is a doubtful question, that the people of the State of Georgia should be left to decide it for themselves as to whether or not this section of their constitution does accord with the Constitution of the United States. To undertake to revise it by these so-called

fundamental conditions is undertaking, it seems to me, on our part to make a constitution for the people of the State of Georgia; and certainly it cannot be said that their constitution with this clause in it is not republican in form, as it is required to be by the reconstruction laws of Congress. [*Id.* 2999.]

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Now, sir, ought we not to let the people of the State of Georgia manage this matter for themselves? We are in no way complicated if we accept this constitution. We did not make it. We do not pass any judgment upon this provision of the constitution. I doubt not there are many provisions in all these constitutions about the constitutionality of which men might very properly differ; but if any man is aggrieved by any provision of any constitution there that is supposed to be unconstitutional, the courts of the country are open for redress, and that man can vindicate his rights there. But, sir, I deny that it is our business to undertake to supervise the creation of these constitutions, beyond requiring that they shall be republican, that they shall protect the civil and political rights of all men; but so far as courts are concerned, so far as contracts are concerned, or commerce, or business within the jurisdiction of these several States, I submit that the people there ought to be left to regulate those matters for themselves. [*Id.* 3000.]

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Mr. CONKLING [of New York]. Mr. President,

having concurred, as a member of the Committee on the Judiciary, in recommending the imposition of this condition, although I do not believe in the general policy of imposing conditions on the admission of States, I beg to assign briefly my reason for concurring in the report of the committee.

* * * it seemed to me that this proposition fell precisely within the principle of the Missouri case. That constitution, as was alleged, in defiance of the Constitution of the United States, attempted to set up an inequality in its own favor; and it was to level that distinction, and to conform it to the Constitution of the United States, that Congress imposed what was there called a condition. This case seemed to me to fall within that principle, because I could not doubt, and after hearing the remarks of the honorable Senator from Ohio and of the honorable Senator from Oregon, I still cannot doubt that these provisions are in palpable and flagrant conflict with the Constitution of the United States.

* * * It may be said that it is just as well to commit to the action of the courts, without any direction from us, the whole question, and trust to the adjudication there; but the other view has been accepted repeatedly, and in the various compacts which have been made in reference to the taxation of the public lands, and a variety of things heretofore referred to in a previous debate Congress has assumed, so that I think we may consider that the better practice, that it is well worth while, on the threshold, to point out and give notice of such repugnancies in proposed constitutions as

we intend to insist upon and denounce as void by the Constitution of the United States. * * * [*Id.* 3001.]

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M. MORTON [of Indiana]. * * *

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I understood the Senator from Oregon to argue that we have nothing to do with a State constitution except so far as to see that it is republican in form; that although it may contain provisions that are inimical to and in direct conflict with the Constitution of the United States, we have nothing to do with it except to see that it is republican in form.

Mr. WILLIAMS. I did not exactly say that, but I said that it was inexpedient. I know that a constitution might contain provisions that we should be bound to reject; but I said that it was not expedient for us to revise a State constitution where it protected the political and civil rights of the State.

Mr. MORTON. I think I understood the Senator's position, and I do not think that his explanation changes it from my version of his opinion. Sir, if a State constitution contains a provision in palpable violation of the constitution of the United States, it is clearly inexpedient for us to give our sanction to it. It is never expedient for the Congress of the United States, in accepting a State constitution, to accept it with provisions that are in direct hostility to that constitution under which we are

authorized to act, the constitution that creates this Government. We cannot sanction receiving a State constitution with provisions directly in conflict with the Constitution of the United States. This provision in the constitution of Georgia is in direct conflict with the Constitution of the United States, and it is inexpedient for us to recognize it as being valid; to receive a State into the Union, to institute a new State government and permit it to go into operation upon provisions of a State constitution that are in direct violation o the Constitution of the United States; and such has been the practice of the Government of the United States. I believe where State constitutions have been presented, from time to time, that have contained provisions regarded as hostile to the Constitution of the United States, they have always been required to change them. [*Id.* 3004.]

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Mr. JOHNSON [of Maryland]. Mr. President, I am opposed, as I have already stated to the Senate, to the imposition of any fundamental condition to the admission of these States into the Union; but being perfectly satisfied that the provision in the constitution of Georgia to which the particular amendment refers is of itself unconstitutional, I could not vote for the admission of the State with that clause * * *.

Mr. HENDRICKS [of Indiana]. I have experienced somewhat the same embarrassment in my reflections on this subject that has been expressed by the Senator from Delaware, [Mr. Bayard.] I

> do not think that we have any right to add one or two [90] or take one word from the constitution of any State. And yet, sir, it is so palpable to my mind that this proposition of repudiation in the Georgia constitution is in violation of the Constitution of the United States that I shall vote against the proposition to strike out that clause of the bill which declares that that cannot be a part of the constitution. I do not feel that in casting this vote I am adding to or taking from a constitution; I feel that I am simply declaring that a provision of that constitution is no part of it, as a legal doctrine, but that it is an effort on the part of the people of Georgia—if it may be said that the people of Georgia have done this at all—to violate the Constitution of the United States, and we merely express our dissent. [*Id.* 3006.]

It is clear from these debates that neither group thought it necessary or appropriate for Congress to approve or disapprove the provisions of the State constitutions in general. All that Congress considered was whether the constitutions had been duly adopted (a subject of much debate which does not concern us here), whether they were republican and, in a very few instances, whether they contained provisions that were flagrantly unconstitutional. The extremely narrow range of the last inquiry is illustrated by the Senate's refusal to insert a condition rejecting a provision of the Alabama constitution, the unconstitutionality of which was thought to be almost, if not quite, as clear as in the case of Georgia. Cong. Globe, 40th Cong., 2d Sess., 3018-3022.

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[90] Query whether "or two" should not read "word to"?

The boundary provision of the Florida constitution was never mentioned in Congress. Florida was not included in the bill as it originally passed the House, and was not mentioned in the debates at that time. It was included by mistake in the amended version reported by the Senate committee, although a majority of the committee opposed its inclusion. Cong. Globe, 40th Cong., 2d Sess., 2858. Except for a statement of that fact, Florida was never mentioned in the Senate debates, but it remained in the bill as passed by the Senate. *Id.* 3029. The only debate on Florida occurred in the House when the amended bill was returned there. *Id.* 3090-3097. Although numerous objections to the Florida constitution were urged at that time, they either were dealt with and rejected as challenges to the republican character of the government, or were summarily dismissed as going beyond that question and therefore beyond the scope of Congress' concern. The following excerpts are illustrative:

> Mr. FARNSWORTH [of Illinois]. * * *
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> Now, what is the constitution of Florida? It erects a little oligarchy down there in Florida; nothing else in the world. It gives to the Governor-elect of that State the power to appoint nearly all the State officers. * * * [*Id.* 3090.]
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>
> Mr. BUTLER [of Massachusetts]. * * *
>
> In the first place, let us examine the method of amending provided for by the constitution of Florida, which he [Mr. Paine, of Wisconsin] thinks is highly improper and detrimental to the interests

of a republican form of government. It is exactly the provision contained in the constitution of the State of Massachusetts; it is exactly the provision of the constitution of the State of New Hampshire * * * and the argument made here goes exactly to the constitutions made by our fathers in 1789, and so downward, under which we have lived and grown to man's estate, without being aware we were not living under a truly republican form of government. [*Id.* 3091.]

* * * * *

Again, it is said the constitution of Florida is not republican because these officers are appointed by the Governor. Why, sir, up to 1855, every State officer in the States of Massachusetts, New Hampshire, and Maine was appointed by the Governor or by the Legislature, and we did not have the advice and consent of the Senate to a single appointment of the Governor. And yet we have an idea in Massachusetts that we were reasonably republican in our State Governments. [*Id.* 3092.]

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Mr. HULBURD [of New York]. * * *

* * * * *

But the gentleman from Wisconsin [Mr. Paine] objects to the high salaries which are provided for. Why, sir, is it desirable that we here should take into consideration and fix the salaries of the Governor and other officers of the various States of this Union? * * * Is that anything that concerns us? I cannot see the force of

an objection founded upon this matter of salaries. So long as the suffrage rights of all the population, without regard to grade, condition, or color, have been cared for, have been properly secured, and the spirit of the reconstruction acts have been complied with, I cannot see how or why we should oppose the admission of Florida because we object to some details involving no general principles or rights, about salaries provided for in the constitution, or because we think the appointing power is too largely vested in the executive of the State, or because we, perchance, differ about the propriety of several of the subordinate local, county, and State officers holding office for the term of four years.

* * * * *

Mr. BINGHAM [of Ohio]. * * *

* * * I undertake to say, Mr. Speaker, of the constitution of the original thirteen States, the constitution of Florida, touching the appointment of judicial and executive officers, is substantially a transcript. It will not do for the House of Representatives at this time of day to declare that the constitutions of the original States of the Union, for the first forty years of our national existence, were not republican, and not in conformity with the Constitution of the United States.

* * * The constitution of my own State, Ohio, followed that precedent, and gentlemen know right well that until within the last eighteen years when that constitution was amended, in 1850, all judicial officers in the State of Ohio were appointed in the same mode and manner as is prescribed in the con-

stitution of Florida. I never heard, Mr. Speaker, the question raised that the constitution of Ohio, adopted in 1802, was not republican. [*Id.* 3093.]

* * * * *

* * * The constitution of Florida makes no discrimination between American citizens of full age being made persons resident in the State, but secures the equal right of suffrage to every one of them upon one year's residence. That accords exactly with my ideas of democracy, as I believe it accords exactly with the ideas of democracy entertained by four fifths of the whole body of the American people. The constitution, sir, is democratic by all the traditions of the Republic. It is republican by all the interpretations of the Constitution of the United States.

Having said this, I shall vote, if I shall vote alone, for the admission of Florida. And I vote for the admission of the five remaining States named in the bill upon the same ground that I would vote for the admission of Florida, to wit, that their constitutions are republican and their provisions for the exercise of the elective franchise democratic; and above all—and it is to this I call the attention of this House and of this country—because upon the admission of these six States, upon the express condition named in the bill, may depend the final ratification and incorporation into the Constitution of the Republic of the fourteenth article of amendment.

* * * * *

> Mr. SHELLABARGER [of Ohio]. * * *
>
> And permit me, in conclusion, to say this: that so far as my memory goes, in all the action of Congress the principle upon which we have acted —I mean the majority in Congress, who have the responsibility of rehabilitating these States and welcoming them back as speedily as possible, with the invocation of God's blessing and the blessing of all good men upon them—I say the principle upon which we have acted has been not to control in details, not to take microscopic views of the constitution, &c., that they present, but simply to see that they are loyal and republican and safe. It was rebellion that dashed them from their orbits, and as soon as the rebellious spirit is purged from them, and they are made right in regard to loyalty, let us welcome them back. That has been from the first and will be to the last my own view of this subject. [*Id.* 3094.]

It is evident from these debates that Congress was doing no more than determining that the several State constitutions were duly adopted and were republican. Rejection of a patent unconstitutionality in one case did not at all imply complete approval of all the other provisions of all the constitutions; it merely represented an attempt by Congress to correct one matter that happened to catch congressional attention.

4. THE RELATED RECONSTRUCTION LEGISLATION DOES NOT INDICATE THAT THE ACT OF JUNE 25, 1868, APPROVED THE FLORIDA BOUNDARY DESCRIPTION

Finding nothing in the Act of June 25, 1868, *supra*, to support its claim of congressional approval of its

Gulf-coast boundary, Florida seeks to call upon some earlier and related reconstruction legislation. But these enactments do not help Florida; if anything, they contradict its claim that Congress approved its three-league boundary claim.

(a). *The Act of March 2, 1867, did not require congressional approval of everything that might be contained in the State constitutions*

To support the claim that the Act of June 25, 1868, *supra*, constituted congressional approval of the boundary provision contained in the Florida constitution, Florida first invokes the Act of March 2, 1867, 14 Stat. 428. Defenses [of Florida] to Amended Complaint, pp. 3-4. The Act of March 2, 1867, entitled "An Act to provide for the more efficient Government of the Rebel States," established military government for Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas and Arkansas, and then provided for creation of new State governments in those States, as follows (14 Stat. at 429):

> Sec. 5. *And be it further enacted,* That when the people of any one of said rebel States shall have formed a constitution of government in conformity with the Constitution of the United States in all respects, framed by a convention of delegates elected by the male citizens of said State, twenty-one years old and upward, of whatever race, color, or previous condition, who have been resident in said State for one year previous to the day of such election, except such as may be disfranchised for participation in the rebellion or for felony at com-

mon law, and when such constitution shall provide that the elective franchise shall be enjoyed by all such persons as have the qualifications herein stated for electors of delegates, and when such constitution shall be ratified by a majority of the persons voting on the question of ratification who are qualified as electors for delegates, and when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same, and when said State, by a vote of its legislature elected under said constitution, shall have adopted the amendment to the Constitution of the United States, proposed by the Thirty-ninth Congress, and known as article fourteen, and when said article shall have become a part of the Constitution of the United States, said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom on their taking the oath prescribed by law, and then and thereafter the preceding sections of this act shall be inoperative in said State: *Provided,* That no person excluded from the privilege of holding office by said proposed amendment to the Constitution of the United States, shall be eligible to election as a member of the convention to frame a constitution for any of said rebel States, nor shall any such person vote for members of such convention.

It was pursuant to that act, as amended, that Florida adopted and submitted to Congress its constitution of 1868, on the basis of which it was admitted to representation by the Act of June 25, 1868, *supra.* Since the Act of March 2, 1867, *supra,* provided that the

States should be admitted to representation when their constitutions were approved by Congress, Florida argues that its admission to representation in 1868 constituted congressional approval of everything contained in its constitution, including the boundary description. However, the congressional debates on the Act of March 2, 1867, show that congressional "approval" of the State constitutions was intended to mean only a determination that the requirements of Section 5 had been met in good faith, establishing loyal and republican governments and guaranteeing civil and political rights, particularly of Negroes.[91] Thus, Representative Bingham of Ohio said, with respect to the provision for congressional approval of the State constitutions (Cong. Globe, 39th Cong., 2d Sess., 1319):

> * * * What is incorporated in this bill? That no one of those States shall attain political power save and except upon the solemn approval by the Congress of the United States of what they may do. Cannot gentlemen trust the Congress to decide whether a State has complied with the requirements of the bill in such form as will secure the protection of each by the combined power of all?

[91] The measure, H.R. 1143, 39th Cong., 2d Sess., as introduced in the House (Cong. Globe, 39th Cong., 2d Sess., 1037) and as originally passed there (*id.* 1206, 1215), only provided for military government. Section 5 was added by a Senate amendment introduced by Senator Johnson of Maryland (*id.* 1360-1361) and revised by Senator Sherman of Ohio (*id.* 1459, 1469); the final proviso was added by the House (*id.* 1399-1400). For the present purpose of finding the intent of Section 5 in its reference to congressional "approval" of the State constitutions, the relevant debates are thus those subsequent to the introduction of that Section in the Senate: Cong. Globe, 39th Cong., 2d Sess., 1360-1361, 1364-1398, 1440-1469, 1315-1340, 1555-1570, 1356-1358, 1399-1400, 1625-1633, 1636-1645, 1728-1733, 1969-1976; App. 123-129, 137-138, 154-161, 166-169.

Similarly, Representative Schenck, also of Ohio, said (*id.* 1320):

> * * * Now, we say that they shall adopt the constitutional amendment; it shall become a part of the Constitution; it shall be approved by their people; their constitution shall be submitted to Congress; they shall allow universal suffrage; and after complying with these and all the other conditions imposed by this bill they are not yet to be admitted until Congress, looking over the whole ground, shall be satisfied that, in spirit as well as in letter, they have done everything that properly entitles them to be restored to their representation in Congress.

Representative Cook, of Illinois, took the same view of the provision for congressional approval (*id.* 1334):

> * * * We by this bill reserve the right in Congress to inspect the constitution that shall be formed and to see whether it duly secures the rights of loyal men; and we shall have the power to protect them. * * *

Senator Sherman of Ohio, author of the final version of Section 5 (except the concluding proviso),[92] said (*id.* 1462):

> Now, in regard to the fifth section * * *. All that it demands of the people of the southern States is to extend to all their male citizens, without distinction of race or color, the elective franchise. * * *

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[92] See fn. 91, *supra*, p. 287.

Clearly, he did not contemplate comprehensive congressional supervision of the State constitutions. Others, by speaking of congressional approval solely in the context of the loyalty of the governments to be established and the protection to be afforded to civil and political rights, likewise showed their understanding that the approval was only to relate to such matters. Thus, Senator Henderson of Missouri said (*id.* 1384):

> I suppose we are not bound to admit the States even after they adopted this [Fourteenth] amendment. I do not hold that that amendment is obligatory upon Congress to admit representatives from the southern States.
>
> * * * * *
>
> * * * If we are satisfied, however, that the provisions in their respective State constitutions will protect the negro in the franchise, I apprehend Congress will admit them. * * * So far as I am concerned, I desire that this amendment shall unmistakably secure to all persons in the southern States the elective franchise; in other words, that whatever excludes the white man from the polls shall exclude the negro; and that no exclusion shall be based upon anything else except participation in the rebellion, felony at the common law, idiocy, or insanity. * * *
>
> * * * * *
>
> * * * my object is to secure the franchise, and after that is secured go forward and establish civil governments in the southern States. * * * I have

no idea that it is at all necessary to go on and demand any other pledges than a loyal delegation from the seceded States, and my opinion is that this will give us a loyal delegation.

Senator Stewart of Nevada said (*id.* 1392):

> * * * I say simply that when they have complied with all the conditions we prescribe—and this is one which we ask of them as a manifestation of loyalty—after they shall have ratified the constitutional amendment, after they shall have framed a loyal constitution, and the proposition as now amended requires it to be framed by delegates elected on the principle of manhood suffrage—after they shall have done all this, after they shall have established manhood suffrage by means of a constitution, and after that constitution shall have been submitted to the people on the principle of manhood suffrage and ratified by them, after their action shall have been submitted to Congress and approved by Congress, we propose to recognize them as valid States. * * *

James G. Blaine, Representative from Maine, spoke of congressional approval in the same light (*id.* 1317-1318):

> Then after the State constitution shall have been framed by the convention, submitted to the people, and adopted by votes of all the male citizens, except such as may be disfranchised by reason of participation in rebellion, it must be submitted to Congress for examination and approval. And being brought here for examination and approval, I submit that what the gentleman

from Pennsylvania [Mr. Stevens] and the gentleman from Massachusetts [Mr. Boutwell] have said is mere bugaboo and scarecrow, because the inquest is left in our hands, plenary and absolute. And that inquest goes to every fact and every circumstance connected with the formation of the new constitution. If in the judgment of Congress any State constitution presented to it for examination and approval shall enfranchise rebels and endanger the stability of the State government by permitting it to fall in the hands of rebels, Congress I assume with all confidence will not approve it. * * *

For other remarks similarly associating congressional approval of the State constitutions with the requirements that they provide loyal and republican governments, see Cong. Globe, 39th Cong., 2d Sess., 1319, 1320, 1561.

(b). *The Act of March 23, 1867, did not require congressional approval of everything that might be contained in the State constitutions*

Prior to passage of the Act of June 25, 1868, 15 Stat. 73, providing for the admission of Florida and five other States to representation in Congress, the preliminary Act of March 2, 1867, 14 Stat. 428, was twice supplemented, by the Act of March 23, 1867, 15 Stat. 2, and the Act of July 19, 1867, 15 Stat. 14, and once amended, by the Act of March 11, 1868, 15 Stat. 41. The history of those supplementary and amendatory acts, so far as it bears on the question at all, corroborates the view that Congress contemplated no general scrutiny of the State constitutions, but only a deter-

mination that they were duly adopted, valid, and republican.

The Act of March 23, 1867 (H.R. 33, 40th Cong., 1st Sess.), established detailed procedures for the registration of voters and adoption of State constitutions. Section 5 provided (15 Stat. 3-4):

> *And be it further enacted,* That if, according to said returns, the constitution shall be ratified by a majority of the votes of the registered electors qualified as herein specified, cast at said election, at least one half of all the registered voters voting upon the question of such ratification, the president of the convention shall transmit a copy of the same, duly certified, to the President of the United States, who shall forthwith transmit the same to Congress, if then in session, and if not in session, then immediately upon its next assembling; and if it shall moreover appear to Congress that the election was one at which all the registered and qualified electors in the State had an opportunity to vote freely and without restraint, fear, or the influence of fraud, and if the Congress shall be satisfied that such constitution meets the approval of a majority of all the qualified electors in the State, and if the said constitution shall be declared by Congress to be in conformity with the provisions of the act to which this is supplementary, and the other provisions of said act shall have been complied with, and the said constitution shall be approved by Congress, the State shall be declared entitled to representation, and senators and representatives shall be admitted therefrom as therein provided.

As in the original Act, the provision for "approval" of the constitutions by Congress was closely linked with the requirements that they be duly adopted and comply with the requirements of the Act; its meaning must be determined in the light of that association. *Noscitur a sociis.*

After the bill passed the House, the Senate committee reported an amendment in the nature of a substitute (Cong. Globe, 40th Cong., 1st Sess., 94), which, with some modification, was ultimately adopted (*id.* 170-171, 189-190, 200, 214-215). As the bill was reported by the Senate committee, Section 4 (Section 5 of the Act as passed) provided that a State should be declared entitled to representation in Congress if Congress found its constitution to conform to the Act of March 2, 1867. Cong. Globe, 40th Cong., 1st Sess., 94. The additional requirement that the constitution be "approved" by Congress was added by a Senate amendment after a brief discussion which clearly showed that it was understood to make little if any difference in the meaning of the measure. Because of its particular significance, we quote in full the discussion leading to that amendment (Cong. Globe, 40th Cong., 1st Sess., 109):

> Mr. TRUMBULL. I think in the tenth line of the fourth section of the amendment of the committee there should be inserted after the word "supplementary" these words, "and the other provisions of said act shall have been complied with." I move that amendment. Those words are in the House bill I will state, but they are omitted in this section of the Senate bill. The necessity for inserting them is this: if the members of the Sen-

ate have the bill before them they will see that the clause reads, beginning at the eighth line—

> And if the said constitution shall be declared by Congress to be in conformity with the provisions of the act to which this is supplementary, the State shall be declared entitled to representation, &c.

Now, something more than the fact that the Constitution is in accordance with the bill to which this is supplementary is requisite; for instance, the constitutional amendment must have been ratified, and it is necessary to put in these words which were in the House bill, so as to declare, not only that the Constitution which is framed must be in accordance with the act to which this is supplementary, but also that the other provisions of that act shall have been complied with. I presume there is no objection to the amendment.

Mr. FESSENDEN. I will inquire if we had not better use the words "and the constitutions approved." That is the language of the original act. One of the provisions, and a very important and essential provision in that act, was that the constitution should be approved by Congress. Now this leaves out that and says simply if the constitution "shall be declared by Congress to be in conformity with the provisions of the act to which this is supplementary"—

Mr. TRUMBULL. "And the other provisions of said act shall have been complied with." I propose to insert those words.

Mr. FESSENDEN. Would that cover as much as the words "and the constitutions approved by

Congress?"

Mr. TRUMBULL. "And the other provisions of said act shall have been complied with."

Mr. FESSENDEN. "And the said constitutions shall be approved by Congress." I want those words in, because the reason why they were in the other bill was that we might retain our power, not knowing what sort of a constitution they would present.

Mr. TRUMBULL. Would the "other provisions of said act" be complied with if the constitution was not approved by Congress?

Mr. FESSENDEN. That would hardly perhaps be called a provision of the act, being something that must be done finally. I would rather those words be retained, because it was an essential idea that after all, although the constitution might contain the provisions specified, it might contain something else that would prevent its being approved by Congress.

Mr. TRUMBULL. Will the Senator look at it more closely? He will see in the tenth line the words, "the State shall be declared entitled to representation." Declared by whom? By Congress. We have to act upon it.

Mr. FESSENDEN. "And if the said constitution shall be declared by Congress to be in conformity with the provisions of the act to which this is supplementary, the State shall be declared entitled to representation."

Mr. TRUMBULL. And now I propose to put in the words which will be found in the eleventh and twelfth lines of the fifth section of the House bill

on page 4, "and the other provisions of said act shall have been complied with."

Mr. FESSENDEN. I wish to add there "and the said constitution shall be approved by Congress."

Mr. TRUMBULL. I have no particular objection to those words.

Mr. FESSENDEN. They are in the original act.

Mr. TRUMBULL. I have no objection to putting in those words; they will follow the words I have proposed; and I accept them if they will avoid any controversy, though I think the object is fully covered by the other words.

The PRESIDENT *pro tempore*. The amendment of the Senator from Illinois will be modified as he proposes.

Mr. TRUMBULL. I presume there will be no objection to this amendment; though I do not offer it from the committee. I did not observe that these words were out. I presume there is no objection from any quarter to inserting them.

The PRESIDENT *pro tempore*. The question is on the amendment offered by the Senator from Illinois to the amendment of the committee.

The amendment to the amendment was agreed to.

As can be seen from this colloquy, the provision for congressional approval of the constitutions was included merely as a safeguard, so that Congress might not be obliged to admit a State to representation if its constitution, though literally complying with the specific requirements imposed by Congress, still contained some unforeseen provision wholly irreconcilable with the congressional purpose. There was no suggestion that it should be given application outside of the par-

ticular area in which Congress was imposing conditions, *i.e.*, the manner of adoption of the constitutions and the adequacy of their provisions to assure a loyal and republican government giving due protection to civil and political rights.

Other discussions showed that certain Senators reserved the right to object to provisions in the State constitutions which should appear undesirable to them, but this right was not tied up with any affirmative requirements and did not alter the scope or the extent of approval given by admitting the States to representation in Congress. Thus, when Senator Drake of Missouri made an unsuccessful proposal that the constitutions be required to make perpetual provision for elections by "closed ballot" rather than *viva voce*, Senator Fessenden of Maine opposed it, saying (Cong. Globe, 40th Cong., 1st Sess., 101):

> Perhaps I would be in favor of it if the constitution when made was conclusive to bring about their admission; but in the bill which we passed we provided that the constitution when made should be submitted to Congress, and if approved by Congress then they might be entitled to representation. That I think sufficient for our security, and I prefer not to put this provision and that provision and the other provision which we desire to have in their constitution into a bill of this kind as preliminary, because I do not want to say to them in advance substantially, "If you do certain things I will agree to your constitution." I am not prepared to say what I shall agree to. I do not know what fault I shall find, and I do not want to say in advance, by implication even, that this is all I require. I prefer that their constitution when it comes here

should pass under our examination, and that then we should be at liberty to state our objections to it, and not be met with the remark, "If you object on this point or that why did you not put it in with other things in your act in the beginning?" I prefer to leave all these questions open for our consideration when the constitution is made and submitted to us for examination.

That statement, that Congress would retain the power to reject a constitution which it found objectionable, falls far short of suggesting that Congress would give affirmative approval to every provision that it did not reject. Moreover, the language, though general in terms, was used in reference to the specific question of the manner of voting—a matter bearing on the republican character of the State government—and does not show that the Senator actually had in mind a scrutiny of the State constitutions in all their details unrelated to that subject.

When Senator Fessenden of Maine made an unsuccessful proposal, designed to insure popular support for the proposed constitutions, that constitutional conventions be held only if called for by the existing State legislatures, Senator Henderson of Missouri said in the course of his opposition to it (Cong. Globe, 40th Cong., 1st Sess., 111):

> * * * I do not think we are obliged to stand by the proposition that was made a few days ago.[93] We can supply other terms, and I think the Senator from Maine has had a very important requirement added this morning, lest the argument of estoppel

[93] That is, the Act of March 2, 1867, 14 Stat. 428.

should be brought against us when these constitutions are brought here, and it be said that we are bound to accept them, that we shall not be allowed to consider the matter at that time. He offered a very important amendment a few moments ago, that the State constitution must not only be in accordance with the terms of the original proposition and in accordance with this act, but that it must be approved by Congress before representatives from these States are admitted. That leaves it entirely in our hands, when they present themselves here, to determine whether they have violated any of the provisions of these acts or whether there is something in their respective constitutions that we do not then like. Whether I shall feel called upon at that time to cast my vote against the admission of any members from these States or not, after the States shall have strictly complied with this law, is another question. I wish to reserve to myself the right at that time to say yea or nay. I am not bound by any act of Congress already passed, nor by any act that shall be passed to-day, nor by any act which may be passed during the present session of Congress or any other session, so as to be utterly unable to consider their constitutions when they present themselves.

Speaking in support of an unsuccessful proposal that conventions be held only if favored by a majority of all registered voters (as opposed to a mere majority of those actually voting), Senator Fessenden said (Cong. Globe, 40th Cong., 1st Sess., 160-161):

As we left it, I would have been satisfied to leave it to-day, and that is, that having provided pro-

tection for the loyal people, for the minority against the majority, we should leave them to work out their own salvation in their own way with reference to forming a constitution, we retaining the power to judge of the mode in which it was framed, and the provisions of it afterward. We were, and should have been, perfectly safe on that. We could know how that constitution was adopted, whether regularly or irregularly; if irregularly, whether in such a mode that we could waive the irregularity, which we would have a perfect right to do; or whether it had provisions in it that prevented our acceptance and adoption of it. It would have been all in our power, perfectly so.[94]

On behalf of his unsuccessful proposal that the State constitutions be required to provide for unsegregated public schools, Senator Sumner of Massachusetts said (Cong. Globe, 40th Cong., 1st Sess., 166):

Sometimes it is argued that it is not permissible to make certain requirements in the new constitutions, although when the constitutions are presented to Congress for approval we may object to them for the want of these very things. For instance, it is said that we may not require educational provisions in the new constitutions; but that we may object to the constitutions when they are formed, if they do not contain this safeguard. This argument forgets the paramount power of Congress over the rebel States, which you have already exercised in ordaining universal suffrage. Who

[94] This description referred to provisions that remained in the act as passed. Senator Fessenden's criticism, which followed, was of the further provisions for military supervision of the procedures.

> can doubt that, with equal reason, you may ordain universal education also? And permit me to say that one is the complement of the other. But I do not stop with this assertion as the power. The argument that we are to wait until the constitution is submitted for approval, is not frank. I wish to be plain and explicit. * * *

Senator Hendricks of Indiana, opposing Senator Sumner's proposal, said (Cong. Globe, 40th Cong., 1st Sess., 168):

> * * * I think the Congress of the United States has no power under the Constitution to make a constitution for a State, any article or any section of any article of a State constitution. What shall be in a State constitution depends altogether on the will and pleasure of the people of that State. Whether Congress may afterward hold that constitution to be republican in form is altogether another question; and the power of Congress to judge of that particular question confers no power upon Congress to prescribe in advance a form of government to a State.

We have found no other significant references to congressional approval of State constitutions, in the debates on the Act of March 23, 1867, 15 Stat. 2. As can be seen, none of the foregoing statements suggested that Congress must give affirmative approval to everything contained in the constitutions submitted, before admitting the States to representation in Congress. Beyond assuring compliance with the specific requirements laid down by Congress in advance, they showed at the most an intention to retain a right of rejection if some particularly obnoxious provision should be

found. Even those general statements of the particular senators must be read in the light of the subjects actually under discussion when they were made, which concerned in each instance the due adoption of the constitutions or the republican character of the governments they established. Thus, when Senator Sumner questioned the propriety of rejecting a constitution which met every affirmative requirement imposed by Congress, Senator Hendricks justified such rejection by reference to the power of Congress to judge whether the constitution were republican in form. We submit that the debates, read as a whole, show no intention that Congress should go beyond that subject and give an affirmative, line-by-line, approval to everything contained in all the State constitutions before admitting representatives of the States to Congress.

(c). *The legislative history of the Act of July 19, 1867, shows Congress' understanding that the Act of March 2, 1867, did not require its approval of everything contained in the State constitutions*

The second act supplementing the Act of March 2, 1867, 14 Stat. 428, was the Act of July 19, 1867, 15 Stat. 14 (H.R. 123, 40th Cong., 1st Sess., embodying by Senate amendment in the nature of a substitute the provisions of S. 131; see Cong. Globe, 40th Cong., 1st Sess., 586). This act made various provisions regarding the military government of the southern States and the registration of voters; it did not relate to the constitutions to be adopted or to congressional approval of them. However, the Senate debates on it contain one significant discussion of that subject. It arose in this way: On July 5, 1867, the Senate adopted a resolution that

> * * * the legislative business of this session be confined to removing the obstructions which have been, or are likely to be, placed in the way of the fair execution of the acts of reconstruction heretofore adopted by Congress, and to giving to said acts the scope intended by Congress when the same were passed; and that further legislation at this session on the subject of reconstruction or on any other subject, is not expedient.

Cong. Globe, 40th Cong., 1st Sess., 481-498. During the debates on S. 131, the provisions of which became the Act of July 19, 1867, 15 Stat. 14, Senator Drake of Missouri proposed an amendment to require the State constitutions to include declarations of loyalty to the United States. That proposal was ruled out of order, under the Resolution of July 5, 1867, *supra,* no such requirement having been imposed by prior reconstruction acts. Cong. Globe, 40th Cong., 1st Sess., 571-573. Senator Buckalew of Pennsylvania argued that, since previous acts provided for congressional approval of the constitutions, any indication of conditions that would have to be met to secure such approval was within the scope of those acts and so permissible under the resolution of July 5, 1867 (Cong. Globe, 40th Cong., 1st Sess., 571):

> Now, sir, in the reconstruction acts it is provided that these constitutions shall be submitted to Congress, and that the approval of Congress shall be deliberately given to them before reconstruction shall take effect. Under that clause or section of the reconstruction laws I think an amendment announcing to those people the conditions in those constitutions which Congress will require for their

approval is giving a necessary and proper notice to the inhabitants in framing their fundamental law, and is in due execution of the general scope and purpose of our whole legislation on this subject, I say this as to the question of order.

* * * * *

I am against the amendment when we reach it.

The President *pro tempore* (Senator Wade of Ohio) ruled the proposal out of order, saying (*ibid.*):

> Important as I deem the amendment offered by the Senator from Missouri, and I think for myself hardly any proposition is more important, still I cannot see that it is fairly within the resolution we have already passed. It introduces a new subject. It may be that these States are required to submit their constitutions when they are altered to the inspection of Congress, and perhaps the revision of Congress; but it seems to me that this provision is foreign to the business of reconstruction as set forth in the several acts on that subject. I do not see that those acts touch this point at all. It strikes me, therefore, that the amendment is out of order as being entirely irrelevant, or rather as introducing a new subject not connected with those acts of reconstruction referred to in the resolution under which we have agreed to act. I must therefore declare it out of order.

Senator Drake appealed the decision of the chair, repeating at greater length the argument advanced by Senator Buckalew (*ibid.*). Senator Sumner of Massachusetts elaborated the same argument, after which occurred the following (*id.* 572):

Mr. POMEROY. I submit to the Senator from Massachusetts that there seems to be a want of good faith on the part of Congress in making provisions for the return of these States in detail, and then when they have complied with those terms and conditions to require something else. For my part, if there is any one thing I prize above another it is in keeping my faith, my pledge, my word, my covenant. This legislation of Congress is a covenant with the South; and when they shall have complied with all that we have required of them and send men here who can take the oath, and do everything we have prescribed to them, they shall be admitted; and to insinuate that we have a right after they have done that to put in other conditions and make other requirements is a lack of faith.

Mr. SUMNER. My friend forgets that the statute positively declares, "and the said constitution shall be approved by Congress," leaving the whole constitution open hereafter to future criticism.

Mr. POMEROY. I understand that approval to be to say whether it comes up to our legislation, whether they have complied with what we required; not only whether the constitution is republican in form, but whether it allows equal and exact justice, civil and political rights to be meted out to all the inhabitants of the State. But to say that we may reserve something here and require it after they come is bad faith toward these people. If I had anything to require of them as an absolute condition of their admission I would put it into the bill before asking them to act upon it. For one, I do not believe we have the right to pre-

scribe new terms and new conditions after they have complied with everything contained in our law.

The ruling of the President *pro tempore* was sustained by the Senate, and the proposed amendment was ruled out of order under the Resolution of July 5, 1867, by a vote of 24 to 13. *Id.* 573. Evidently a substantial majority of the Senate concurred in Senator Pomeroy's view that the provision for "approval" went only to compliance with the conditions prescribed by the statute, and that the imposition of a condition for approval other than those so prescribed would go beyond the scope of the Act of March 2, 1867, as amended.

(d). *The Act of March 11, 1868, puts no different light on the subject*

The Act of March 11, 1868, 15 Stat. 41 (H. R. 214, 40th Cong., 2d Sess.) amended the Act of March 2, 1867, 14 Stat. 428, by eliminating the requirement that a majority of the registered voters must participate in the election in order to adopt a proposed State constitution. Neither the act nor the debates on it relate to the question of congressional approval of the constitutions.

(e). *An unexpressed intent to approve, by the Act of June 25, 1868, all the provisions of the State constitutions cannot be supplied by reference to the Act of March 2, 1867*

The legislative history of the Act of March 2, 1867, 14 Stat. 428, and the supplementary Act of March 23, 1867, 15 Stat. 2, is sufficient to show that Congress

never expected to approve the contents of the State constitutions beyond determining that they complied with the affirmative requirements of those acts. *Supra*, pp. 285-302. It was never contemplated that all the constitutional provisions should be taken as approved because no objection was raised. This showing of the congressional purpose is particularly important because we are considering here not the effect of those acts but rather the meaning and effect of the Act of June 25, 1868, 15 Stat. 73, by which Florida and other States were readmitted to representation in Congress. Florida seeks to read into that Act an implied approval of all the contents of its constitution, including its boundary description, on the ground that the earlier acts called for such comprehensive approval. That is, Florida argues that by the Act of June 25, 1868, Congress meant more than it said; for clearly it said nothing about approving the constitution in that act. But if the question is, what did Congress mean by the second act, quite apart from what it explicitly said there, it cannot be answered merely by looking at what it said in the first act. If we are to look behind the words of one act, we must look behind the words of both, and see what Congress meant by the Act of March 2, 1867, and its supplements. As we have shown, the legislative history reveals that Congress never intended, by the provision for approving the State constitutions, more than that in the absence of specific exception it should determine whether there had been a *bona fide* compliance with the requirements of the reconstruction acts as to the adoption of the constitutions, the form of government established, and the protections afforded to individuals. We find nothing to show that Congress took a broader view of the matter,

although there was some difference of opinion as to whether the "approval" was to be limited simply to finding compliance with the specific requirements laid down by Congress, or could include a general evaluation of those aspects of the constitutions. Neither view contemplated any scrutiny of other aspects of the constitutions; consequently, there is no foundation for the contention that a comprehensive approval must be read by implication into the Act of June 25, 1868, in which no approval at all is expressed. On the contrary, we submit that the legislative history of the Act of June 25, 1868, discussed above (pp. 270-284), shows that Congress did not intend to give any blanket approval to all the provisions of all the constitutions. No doubt it was for that very reason that no words of approval were included in the Act of June 25, 1868.

Moreover, even if the Act of March 2, 1867, 14 Stat. 428, as supplemented and amended, were to be understood as having contemplated that Congress would approve every word of every constitution before readmitting the State representatives to Congress, still that would not show that Congress had actually done so when the time came. The history of the Act of June 25, 1868, 15 Stat. 73, conclusively shows that Congress did not consider itself bound to act in accordance with the previous statutes, for in at least one respect it squarely refused to do so.

Section 5 of the Act of March 23, 1867, required that the State constitutions be ratified at elections at which there were "at least one half of all the registered voters voting upon the question of such ratification." 15 Stat. 3; *supra*, p. 292. This requirement, that a majority of the registered voters actually participate in the

election, meant that an abstention had somewhat the effect of a negative vote. That requirement was repealed by the Act of March 11, 1868, 15 Stat. 41, but in the mean time the election on the Alabama constitution had been held in February 1868 under the old requirement. Although a large majority of those voting favored the constitution, a majority of the registered voters abstained from voting, thereby defeating the constitution according to the provisions of the Act of March 23, 1867. H. Exec. Doc. No. 238, 40th Cong. 2d Sess. Nevertheless, Alabama was included in the Act of June 25, 1868, as reported by the House Committee, and an amendment to exclude it was defeated after considerable discussion. Cong. Globe, 40th Cong., 2d Sess., 2446-2447, 2463-2464. The Senate committee, reporting its amended version of the bill, excluded Alabama because its constitution was rejected by the people, according to the statutory provisions applicable at the time the election was held, but an amendment to add it was adopted after extensive debate. Cong. Globe, 40th Cong., 2d Sess., 2858, 2859-2872, 2895-2904, 2927-2935, 2963-2965.

Congress thus showed that in passing the Act of June 25, 1868, it did not consider itself bound by the terms of the Act of March 2, 1867, and its supplementary acts. Accordingly, those acts could not be accepted in any event as determinative of what Congress intended to do when it passed the Act of June 25, 1868. As we have shown, the latter act, judged by its own terms and its own history, as well as in the light of the previous acts, was not, and was not intended to be, an approval of the numerous provisions of the several State constitutions.

(f). *In the debates on the Act of March 2, 1867, it was said that State boundaries were to remain unchanged*

As already noted, in the debates on the Act of June 25, 1868, we find no reference whatever to the boundaries of Florida or of any of the other States covered by that act. The general subject of boundaries was mentioned briefly however in the debates on the Act of March 2, 1867, in a different connection. As originally reported to the House, that measure referred to the southern States as "so-called States". Cong. Globe, 39th Cong., 2d Sess., 1037. Representative Bingham of Ohio urged deletion of the term "so-called", on the ground that it would cast an unjustified and unnecessary doubt on the areas referred to. He said (*id.* 1081):

> I would also suggest that this bill be amended in the third line of the first section by striking out the phrase "so-called," so it will read "the said States" * * *. Why use the words "so-called State of Virginia," and thereby raise a doubt what are the boundaries of that territory? Why not use the words in the last clause of the first section as I have just read them, without limiting them by the terms "so-called?" Every gentleman knows you must, under this bill, recognize the boundaries of these States as originally fixed by the sovereignty of this Union; and that they stand as they were to this day. The territorial jurisdiction becomes a very important consideration, as my learned friend well knows, and the territorial jurisdiction of whatever tribunals you create, whether civil or military, must be ascertained pre-

cisely by law. Grave, difficult questions arise if this be not done. Hence it is I propose to strike out the terms "so-called" in the third section, and insert "said States."

A little later he repeated the same view. *Id.*, App. 89. There was not a vote on the point at that time, but the expression "so-called" was not retained, with reference to individual States, in the bill as it passed the House (*id.*, 1206, 1215)[95] or as finally enacted (14 Stat. 428). This recognition that the boundaries of the States necessarily remained unchanged conforms to the fact that Congress was not admitting States to the Union, but was merely admitting Representatives and Senators to Congress. *White* v. *Hart*, 13 Wall. 646, 651-652; *supra*, pp. 268-269. It negatives any idea that Congress would have considered this an appropriate time to approve an attempt by one of the States to enlarge its boundaries.

5. ACTS READMITTING OTHER SOUTHERN STATES TO REPRESENTATION IN CONGRESS SHOW NO INTENTION TO GIVE GENERAL APPROVAL TO THEIR CONSTITUTIONAL PROVISIONS

The five southern States not admitted to representation in Congress by the Act of June 25, 1868, 15 Stat. 73, were admitted by five separate acts, Tennessee by the Act of July 24, 1866, 14 Stat. 364, prior to the Act of March 2, 1867, 14 Stat. 428, and the remaining four under the latter Act; Arkansas by the Act of June 22,

[95] As the bill passed the House, it did retain references to the "so-called confederate States" (Cong. Globe, 39th Cong., 2d Sess., 1206), an expression which of course has quite a different justification. Even that expression was dropped from the act as finally passed.

1868, 15 Stat. 72; Virginia by the Act of January 26, 1870, 16 Stat. 62, as amended by the Act of February 1, 1870, 16 Stat. 63; Mississippi by the Act of February 23, 1870, 16 Stat. 67; and Texas by the Act of March 30, 1870, 16 Stat. 80. While those acts have no direct application to Florida, they are *in pari materia* with the Act of June 25, 1868, 15 Stat. 73, by which Florida was readmitted to representation in Congress and in that light their history is relevant to the extent that it shows a general congressional attitude toward the subject. We find in the history of those acts nothing to show that Congress considered or approved provisions of the State constitutions beyond determining that they were duly adopted and established loyal and republican governments. See Appendix H, *infra*, pp. 409-425, for the detailed history of that legislation.

We have undertaken this review of the whole body of reconstruction acts related to the Act of June 25, 1868—under which Florida was admitted to representation in Congress after the Civil War—because we think it shows conclusively that the absence of any mention, in the congressional debates, of the boundary provision of the Florida constitution cannot be understood as reflecting a tacit approval of that provision. Rather, it is but part of the whole picture of non-discussion of any of the provisions of any of the constitutions, except those directly relating to the specific problems of reconstruction or constitutionality, and reflects Congress' understanding that it was not concerned with other matters. This history supports the interpretation of the Act of June 25, 1868, apparent on its face and declared by this Court, that its only effect

was to provide for the admission to Congress of representatives of the States concerned. We submit, in short, that Florida's three-league boundary claim was not approved by the Act of June 25, 1868, the only statute relied on for that purpose.

B. FLORIDA CAN BASE NO RIGHTS BEYOND THE THREE-MILE LIMIT ON FORMER SPANISH OR BRITISH CLAIMS

Florida's third and fourth defenses (pp. 4-6) are that boundaries extending at least three leagues into the Gulf of Mexico were established for Florida by Great Britain and by Spain when they possessed Florida, and that consequently Florida had such a boundary prior to and when it became a member of the Union. We are not informed as to the particular historic facts which are supposed to have established three-league boundaries for Florida as a British or Spanish possession, and so cannot comment on them at this time. However, the provinces of East and West Florida were established by a proclamation of George III of October 7, 1763, which described them as being bounded by the Gulf of Mexico, as follows:

> Secondly, the government of the East Florida, bounded to the westward by the Gulf of Mexico and the Apalachicola river; to the northward by a line drawn from that part of the said river where the Chatahoochie and Flint rivers meet, to the source of St. Mary's rivers, and by the course of the said river to the Atlantic ocean; and to the east and south by the Atlantic ocean and the gulf of Florida, including all islands within six leagues of the sea coast.
>
> Thirdly, the government of West Florida, bounded to the southward by the gulf of Mexico,

> including all islands within six leagues of the coast, from the river Apalachicola to Lake Pontchartrain; to the westward by the said lake, the lake Maurepas, and the river Mississippi; to the northward by a line drawn due east from that part of the river Mississippi which lies in thirty-one degrees north latitude, to the river Apalachicola or Chatahoochie, and to the eastward by the said river.[96]

As we have already discussed (*supra*, p. 176), the expression, "bounded by the Gulf of Mexico", must be understood to mean bounded by the edge of the Gulf. Likewise, "including all islands within six leagues of the coast" meant only that the islands themselves were to be considered part of Florida. *Supra*, pp. 172-177. In subsequent transfers the Floridas were designated by name, without description. Article V of the "Definitive Treaty of Peace and Friendship" signed at Versailles on September 3, 1783, by which Great Britain retroceded Florida to Spain, provided:

> His Britannic Majesty moreover cedes and guarantees, in full ownership, to his Catholic Majesty, Eastern Florida as well as Western Florida. * * * [97]

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[96] 2 White, *New Collection of Laws, Charters and Local Ordinances of Great Britain, France and Spain* (1839) 292; *American State Papers*, 5 Public Lands 756; H. Doc. No. 121, 20th Cong., 2d Sess., 259-260. For the date of the proclamation, see Whitfield's Notes, 3 Fla. Stats. (1941) 224.

[97] 3 Fla. Stats. (1941) 101. In the official French text, "Sa Majesté Britannique cède en outre, et garantit, en toute propriété, à sa Majesté Catholique, la Floride Orientale, ainsi que la Floride Occidentale." 3 Jenkinson, *Collection of all the Treaties of Peace, Alliance, and Commerce, between Great-Britain and Other Powers* (1785) 375, 378.

Similarly, Article 2 of the Treaty of February 22, 1819, by which Spain ceded Florida to the United States, provided (8 Stat. 252, 254):

> His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida. *The adjacent islands dependent on said provinces,* all public lots and squares, vacant lands, public edifices, fortifications, barracks, and other buildings, which are not private property, archives and documents, which relate directly to the property and sovereignty of said provinces, are included in this article. * * * [Emphasis added.] [98]

Reference to the islands as "adjacent" is inconsistent with the contention that they were included within the perimeter of the Floridas. Both of the foregoing treaties, designating the Floridas by name and without description, must be understood as referring to them as described by the proclamation of George III, *supra,* by which they were established, that is, as being bounded by the Gulf of Mexico, and including islands within six leagues of that boundary.

However, the more fundamental position of the United States is that it is immaterial what boundaries in the sea were claimed for Florida by Great Britain or Spain. As discussed above (*supra,* pp. 59-101), the

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[98] The Spanish text reads as follows (8 Stat. 255):

> S. M. C[a]. cede á los Estados Unidos, en toda propiedad y soberania, todos los territorios que le pertenecen, situados al Este del Misisipi, conocidos bajo el nombre de Florida Occidental y Florida Oriental. Son comprehendidos en este articulo las yslas adyacentes dependientes de dichas dos provincias * * *.

United States has consistently disclaimed for itself a marginal belt more than three miles wide, and has consistently asserted the invalidity under international law of such claims by other nations. Consequently, regardless of what boundaries Great Britain or France claimed, so far as the United States is concerned their boundaries did not extend seaward more than three miles, and no boundaries extending farther seaward were ever acquired by the United States. So far as Florida is concerned, it can make no difference whether boundaries "as they existed at the time such State became a member of the Union", referred to by Section 2(b) of the Submerged Lands Act, 43 U. S. C., Supp. V, 1301(b), means boundaries as they were up to the moment of statehood, or as they were from and after the moment of statehood.[99] Florida was acquired from Spain by the Treaty of February 22, 1819, 8 Stat. 252, but was not admitted to statehood until March 3, 1845, 5 Stat. 742. In the interval it was organized as a territory by the Act of March 30, 1822, 3 Stat. 654. Thus, for many years before it became a member of the Union, it belonged to the United States and its boundaries were determined by the policy of the United States. As we have shown, that policy limited the boundaries of the United States to an extent of three miles from the coast.

C. THE BOUNDARIES REFERRED TO BY THE SUBMERGED LANDS ACT ARE FIXED AT THE THREE-MILE LIMIT BY INTERNATIONAL AND NATIONAL LAW

Florida's fifth defense is that international law does not limit marginal seas to a width of three miles and does not invalidate the provisions of the Submerged

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[99] See *supra*, pp. 47-51.

Lands Act. Defenses [of Florida] to Amended Complaint, pp. 6-7. The first proposition is discussed under Point I, *supra,* pp. 59-147. As to the second proposition, the position taken by the United States does not depend upon an invalidation of the Submerged Lands Act by reason of international law. The "boundaries" referred to by that act must be boundaries validly established in accordance with the law of the United States, including international law as understood and applied by the United States. The United States has taken the position that international law does not sanction territorial boundaries extending seaward more than three miles, and it has restricted its own seaward boundary to that limit. Since the States cannot extend farther than the Nation, the State boundaries are necessarily limited to three miles; from which it follows that the grant made by the Submerged Lands Act, being measured by the State boundaries, extends no farther. This subject, also, is fully covered by Point I, *supra,* pp. 147-151.

VII

THE CROSS-BILL OF THE STATE OF ALABAMA SHOULD BE DISMISSED

Alabama has designated its answer also as a cross-bill, and asks a declaration that it is entitled to the submerged lands and resources within three leagues of the shore and that its boundary is six leagues from the shore. Answer and Cross-bill of State of Alabama to Amended Complaint, pp. 7-8. The United States has moved for dismissal of the pleading as a cross-bill, on the ground that it is a suit against the United States to which Congress has not consented. Motions [of the United States] for Judgment and for Dismissal of

Cross-bill Filed by the State of Alabama, etc., p. 2. We submit that the cross-bill should be dismissed for that reason.

The United States cannot be sued except as Congress has consented thereto; and this immunity from suit applies not only to suits initiated by the adverse party but also to cross-claims filed by defendants in suits brought by the United States. *United States* v. *Shaw*, 309 U. S. 495, 500-505; *Illinois Central R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 504-505. The rule applies to suit by States as well as suit by individuals. *Minnesota* v. *United States*, 305 U. S. 382, 387. Neither the Court, nor the Attorney General, nor both together, can give such consent where it has not been given by Congress. Alabama relies on the Submerged Lands Act as having "impliedly, if not expressly" consented to suit "by any interested state relative to the establishment of states' rights under the Submerged Lands Act." Answer and Cross-bill of State of Alabama to Amended Complaint, p. 7. We find no such consent, express or implied, in that Act. The Act simply grants certain rights to the States, and makes no reference whatever to suit against the United States. No consent to such suit can be implied from the mere grant of rights; the United States is under no obligation to provide a judicial remedy for enforcement of rights which it creates against itself. *United States* v. *Babcock*, 250 U. S. 328, 331. While Congress undoubtedly realized that adjudication would be needed to determine the extent of the grant (*supra*, pp. 51-58), the normal expectation would be that such adjudication should be in a suit brought by the United States. There is nothing in the mere fact of a grant implying consent to be sued to determine the extent

of the grant, and certainly nothing implying consent to be sued for a declaration as to the location of State boundaries apart from the area granted. The cross-bill should be dismissed.[100]

VIII

THE UNITED STATES IS ENTITLED TO JUDGMENT ON THE PLEADINGS

The answers of the several defendants all contain denials or contradictions of material allegations of the amended complaint. As we have shown (*supra*, pp. 27-151), all the material facts alleged in the complaint are subject to judicial notice. Denials of such allegations raise no genuine issue of fact, so as to prevent entry of summary judgment. *Fletcher* v. *Evening Star Newspaper Co.*, 133 F. 2d 395 (C. A. D. C.); see 6 Moore, *Federal Practice* (2d ed. 1953) 2085. Cf. the opinion of Mr. Justice Frankfurter in *United States* v. *John J. Felin & Co.*, 334 U. S. 624, 639: "It is as old as the common law that an allegation purporting to be one of fact but contradicted by common knowledge is not confessed by a demurrer."

Louisiana argues (Reply of the State of Louisiana to Brief of the United States on Motion for Judgment [on original complaint], pp. 8-9) that, if judgment is to be entered on the basis of the pleadings and facts

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[100] Dismissal of the cross-bill will not affect Alabama's right to a judgment declaring the extent of the area granted to it by the Submerged Lands Act. In a proceeding in the nature of a suit to quiet title, such relief may be sought by answer as well as by cross-bill; it is not affirmative relief to the defendant, but is necessarily inherent in the determination sought by the plaintiff of the respective rights of the parties in the property. See *Ohio Oil Co.* v. *Thompson*, 120 F. 2d 831, 837 (C.A. 8), certiorari denied, 314 U.S. 658.

subject to judicial notice, then Congress did a useless thing when it declared that the Submerged Lands Act should not prejudice State claims of historic boundaries extending more than three miles in the Gulf of Mexico. This is a complete *non sequitur*. Congress refrained from prejudicing those claims by legislation, because advocates of the State claims urged that judicial, rather than legislative, action was the appropriate way to settle the validity of claims as to what was the existing state of affairs. By its hands-off policy, Congress did not *improve* the standing of those claims, or alter the judicial techniques by which they should be determined. If, as we believe, the Court judicially knows facts which necessarily defeat those claims, no factual evidence can affect the outcome of the case, and no evidence should be taken. What Congress did was simply to refrain from expressing an opinion as to the legal validity of the position which the Government now urges, preferring to leave to this Court the question of whether that position is or is not sound. That is a judicial question which is now presented to this Court for decision, as Congress contemplated that it should be.

Louisiana has argued that it should be allowed to introduce evidence of its long-continued exercise of governmental and proprietary rights in the continental shelf. Brief of the State of Louisiana in Opposition to Motion for Judgment by the United States [on original complaint], pp. 131-141. We believe that it is not appropriate for the Court to receive evidence on those subjects. This Court decided in 1947 and 1950 that coastal States had no proprietary interest in offshore submerged lands. *United States* v. *California*, 332 U. S. 19; *United States* v. *Louisiana*, 339 U. S. 699;

United States v. *Texas*, 339 U. S. 707. The only title that they now have therein is such as is granted by the Submerged Lands Act (*supra*, pp. 27-30). Consequently, evidence of their prior exercise of proprietary rights is irrelevent. In any event, they could not acquire prescriptive rights against the United States. *United States* v. *California*, 332 U. S. 19, 39-40.

Texas, Mississippi and Florida have asked leave to introduce evidence as to the meaning and effect of the statutes and international law relating to their several claims, including testimony of experts in the field of international law. Answer of the State of Texas to the Motion of the United States for Judgment, etc., pp. 2, 4, 7-9; Answer of the State of Mississippi to the Motion of the United States for Judgment, etc., pp. 2-3, 5, 7-9; Answer of the State of Florida to the Motion of the United States for Judgment, etc., pp. 3, 5-6, 8-10. Alabama has suggested a need for evidence, without indicating its character. Answer of Alabama to Motion of United States for Judgment, etc., pp. 2-3. We believe that the questions here involved can be answered by reference to facts subject to judicial notice, as set forth in this brief. So far as the opinions of international law experts are concerned, it seems that they would more appropriately be presented as argument than as evidence. And we know of no other "evidence" relevant to the issues now before the Court which cannot appropriately be presented in a brief and thus submitted to the Court for judicial notice.

After entry of a decree declaring the distance seaward to which the defendants are entitled, it may be necessary to enter supplemental decrees precisely identifying some portions of the base line from which

that distance is to be measured. Various questions may be involved such as the physical location of the low-water mark or the proper limits of inland waters, which may require the taking of evidence.[101] However, the width of the marginal belt can be determined without going into those questions, and we believe that it will be simpler and more satisfactory to approach the case in that way rather than to receive extensive factual evidence before it is known with precision what the factual issues will be. That was the procedure followed in *United States* v. *California*, 332 U. S. 19, 26. As we have shown, all of the facts necessary to a decision of the primary question, the width of the marginal belt, are subject to judicial notice. The case is therefore a proper one for entry of judgment on the pleadings.

CONCLUSION

For the foregoing reasons, this Court should now enter a decree declaring that the United States is entitled, as against the States of Louisiana, Texas, Mississippi, Alabama and Florida, to the lands, minerals and other things underlying the Gulf of Mexico, the Straits of Florida and the Atlantic Ocean, lying more than three geographic miles seaward from the ordinary low-water mark and from the outer limit

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[101] Until the width of the marginal belt is known, there can be no complete identification of the waters whose status (as inland water or marginal sea) is material to the case. For example, if Louisiana owned all the submerged lands to the 27th parallel it would not be necessary to identify any inland waters at all. Even under that State's most modest claim, of a marginal belt of three leagues, Louisiana would own the beds of all bays with mouths less than six leagues wide, while under the three-mile contention of the United States it will be necessary to decide the inland water status of all bays more than six miles in width.

of inland waters and extending seaward to the edge of the continental shelf, and that those States have no title thereto or property interest therein; declaring that the United States is entitled to an accounting by each of the defendant States for any sums of money derived by it from such lands and minerals after June 5, 1950; dismissing the cross-bill of the State of Alabama; and retaining jurisdiction of the case for such further proceedings as may be necessary to effectuate the decree.

Respectfully submitted,

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MAY 1958.

1. Orleans Territory Organic Act, March 26, 1804, 2 Stat. 283.

CHAP. XXXVIII.—*An Act erecting Louisiana into two territories, and providing for the temporary government thereof.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all that portion of country ceded by France to the United States, under the name of Louisiana, which lies south of the Mississippi territory, and of an east and west line to commence on the Mississippi river, at the thirty-third degree of north latitude, and to extend west to the western boundary of the said cession, shall constitute a territory of the United States, under the name of the territory of Orleans * * * .

* * * * *

2. Louisiana Enabling Act, February 20, 1811, 2 Stat. 641.

CHAP. XXI.—*An Act to enable the people of the Territory of Orleans to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the territory or country ceded under the name of Louisiana, by the treaty made at Paris on the thirtieth day of April, one thousand eight hundred and three, between the United States and France, contained within the following limits, that

is to say: beginning at the mouth of the river Sabine, thence by a line to be drawn along the middle of the said river, including all islands to the thirty-second degree of latitude; thence due north, to the northernmost part of the thirty-third degree of north latitude; thence along the said parallel of latitude to the river Mississippi; thence down the said river to the river Iberville; and from thence along the middle of the said river and lakes Maurepas and Ponchartrain, to the gulf of Mexico; thence bounded by the said gulf to the place of beginning; including all islands within three leagues of the coast, be, and they are hereby authorized to form for themselves a constitution and state government, and to assume such name as they may deem proper, under the provisions and upon the conditions herein after mentioned.

* * * * *

3. Act for the Admission of Louisiana, April 8, 1812, 2 Stat. 701.

CHAP. L.—*An Act for the admission of the State of Louisiana into the Union, and to extend the laws of the United States to the said state*

Whereas, the representatives of the people of all that part of the territory or country ceded, under the name of "Louisiana," by the treaty made at Paris, on the thirtieth day of April, one thousand eight hundred and three, between the United States and France, contained within the the following limits, that is to say: beginning at the mouth of the river Sabine; thence, by a line to be drawn along the middle of said river, including all islands to the thirty-second degree of latitude; thence, due north, to the northernmost part

of the thirty-third degree of north latitude; thence, along the said parallel of latitude, to the river Mississippi; thence, down the said river, to the river Iberville; and from thence, along the middle of the said river, and lakes Maurepas and Ponchartrain, to the gulf of Mexico; thence, bounded by the said gulf, to the place of beginning, including all islands within three leagues of the coast; did, on the twenty-second day of January, one thousand eight hundred and twelve, form for themselves a constitution and state government, and give to the said state the name of the State of Louisiana, in pursuance of an act of Congress, entitled "An act to enable the people of the territory of Orleans to form a constitution and state government, and for the admission of the said state into the Union, on an equal footing with the original states, and for other purposes:" And the said constitution having been transmitted to Congress, and by them being hereby approved; therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said state shall be one, and is hereby declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever, by the name and title of the state of Louisiana * * *.

* * * * *

4. Mississippi Enabling Act, March 1, 1817, 3 Stat. 348.

CHAP. XXIII.—*An Act to enable the people of the western part of the Mississippi territory to form a constitution and state government, and for the admission of such state into the union, on an equal footing with the original states.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the inhabitants of the western part of the Mississippi territory be, and they hereby are, authorized to form for themselves a constitution and state government, and to assume such name as they shall deem proper; and the said state, when formed, shall be admitted into the union upon the same footing with the original states, in all respects whatever.

SEC. 2. *And be it further enacted,* That the said state shall consist of all the territory included within the following boundaries, to wit: Beginning on the river Mississippi at the point where the southern boundary line of the state of Tennessee strikes the same, thence east along the said boundary line to the Tennessee river, thence up the same to the mouth of Bear Creek, thence by a direct line to the north-west corner of the county of Washington, thence due south to the Gulf of Mexico, thence westwardly, including all the islands within six leagues of the shore, to the most eastern junction of Pearl river with Lake Borgne, thence up said river to the thirty-first degree of north latitude, thence west along the said degree of latitude to the Mississippi river, thence up the same to the beginning.

* * * * *

5. Alabama Territory Organic Act, March 3, 1817, 3 Stat. 371.

CHAP. LIX.—*An Act to establish a separate territorial government for the eastern part of the Mississippi territory.*

Be it enacted by the Senate and House of Representatives of the United States of America, in

Congress assembled, That all that part of the Mississippi territory which lies within the following boundaries, to wit: beginning at the point where the line of thirty-first degree of north latitude intersects the Perdido river, thence east to the western boundary line of the state of Georgia, thence along said line to the southern boundary line to the state of Tennessee, thence west along said boundary line to the Tennessee river, thence up the same to the mouth of Bear creek, thence by a direct line to the north-west corner of Washington county, thence due south to the Gulf of Mexico, thence eastwardly, including all the islands within six leagues of the shore, to the Perdido river, and thence up the same to the beginning, shall, for the purpose of a temporary government, constitute a separate territory, and be called "Alabama."

* * * * *

6. Alabama Enabling Act, March 2, 1819, 3 Stat. 489.

CHAP. XLVII.—*An Act to enable the people of the Alabama territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the inhabitants of the territory of Alabama be, and they are hereby, authorized to form for themselves a constitution and state government, and to assume such name as they may deem proper; and that the said territory, when formed into a state, shall be admitted into the union, upon the same footing with the original states, in all respects whatever.

SEC. 2. *And be it further enacted,* That the said state shall consist of all the territory included within the following boundaries, to wit: Beginning at the point where the thirty-first degree of north latitude intersects the Perdido river; thence, east, to the western boundary line of the state of Georgia; thence along said line, to the southern boundary line of the state of Tennessee, thence, west, along said boundary line, to the Tennessee river; thence, up the same, to the mouth of Bear creek; thence, by a direct line, to the north-west corner of Washington county; thence, due south, to the Gulf of Mexico; thence, eastwardly, including all islands within six leagues of the shore, to the Perdido river; and thence, up the same to the beginning.

SEC. 3. *And be it further enacted,* That it shall be the duty of the surveyor of the lands of the United States south of the state of Tennessee, and the surveyor of the public lands in the Alabama territory, to run and cut out the line of demarcation, between the state of Mississippi and the state to be formed of the Alabama territory; and if it should appear to said surveyors, that so much of said line designated in the preceding section, running due south, from the north-west corner of Washington county to the Gulf of Mexico, will encroach on the counties of Wayne, Green, or Jackson, in said state of Mississippi, then the same shall be so altered as to run in a direct line from the north-west corner of Washington county to a point on the Gulf of Mexico, ten miles east of the mouth of the river Pascagola.

* * * * *

7. Joint Resolution for the Annexation of Texas, March 1, 1845, 5 Stat. 797.

No. 8. *Joint Resolution for annexing Texas to the United States.*

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent that the territory properly included within, and rightfully belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas * * *.

2. *And be it further resolved,* That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: *First,* Said State to be formed, subject to the adjustment by this government of all questions of boundary that may arise with other governments * * *.

* * * * *

8. Joint Resolution for the admission of Texas, December 29, 1845, 9 Stat. 108.

[No. 1.] *Joint Resolution for the Admission of the State of Texas into the Union.*

WHEREAS the Congress of the United States, by a joint resolution approved March the first, eighteen hundred and forty-five, did consent that the territory properly included within, and rightfully belonging to, the Republic of Texas, might be erected into a new State, to be called *The State of Texas* * * *: Therefore—

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of Texas shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on

an equal footing with the original States in all respects whatever.

* * * * *

9. Reconstruction Act admitting North Carolina, South Carolina, Louisiana, Georgia, Alabama and Florida to representation in Congress, June 25, 1868, 15 Stat. 73.

CHAP. LXX.—*An Act to admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress.*

Whereas the people of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida have, in pursuance of the provisions of an act entitled "An act for the more efficient government of the rebel States," passed March second, eighteen hundred and sixty-seven, and the acts supplementary thereto, framed constitutions of State government which are republican, and have adopted said constitutions by large majorities of the votes cast at the elections held for the ratification or rejection of the same: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That each of the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, shall be entitled and admitted to representation in Congress as a State of the Union when the legislature of such State shall have duly ratified the amendment to the Constitution of the United States proposed by the Thirty-ninth Congress, and known as article fourteen, upon the following fundamental conditions: That the constitutions of neither of said States shall ever be so amended or changed as to

deprive any citizen or class of citizens of the United States of the right to vote in said State, who are entitled to vote by the constitution thereof herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: *Provided*, That any alteration of said constitution may be made with regard to the time and place of residence of voters; and the State of Georgia shall only be entitled and admitted to representation upon this further fundamental condition: that the first and third subdivisions of section seventeen of the fifth article of the constitution of said State, except the proviso to the first subdivision, shall be null and void, and that the general assembly of said State by solemn public act shall declare the assent of the State to the foregoing fundamental condition.

SEC. 2. *And be it further enacted*, That if the day fixed for the first meeting of the legislature of either of said States by the constitution or ordinance thereof shall have passed or have so nearly arrived before the passage of this act that there shall not be time for the legislature to assemble at the period fixed, such legislature shall convene at the end of twenty days from the time this act takes effect, unless the governor elect shall sooner convene the same.

SEC. 3. *And be it further enacted*, That the first section of this act shall take effect as to each State, except Georgia, when such State shall, by its legislature, duly ratify article fourteen of the amendments to the Constitution of the United States, proposed by the Thirty-ninth Congress, and as to the State of Georgia when it shall in addition give the assent of said State to the fundamental con-

dition hereinbefore imposed upon the same; and thereupon the officers of each State duly elected and qualified under the constitution thereof shall be inaugurated without delay; but no person prohibited from holding office under the United States, or under any State, by section three of the proposed amendment to the Constitution of the United States, known as article fourteen, shall be deemed eligible to any office in either of said States, unless relieved from disability as provided in said amendment; and it is hereby made the duty of the President within ten days after receiving official information of the ratification of said amendment by the legislature of either of said States to issue a proclamation announcing that fact.

10. Submerged Lands Act, May 22, 1953, 67 Stat. 29, 43 U.S.C., Supp. V, 1301-1315.

AN ACT

To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Submerged Lands Act".

TITLE I

DEFINITION

SEC. 2. [43 U. S. C., Supp. V, 1301] When used in this Act—

(a) The term "lands beneath navigable waters" means—

* * * * *

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles * * *;

* * * * *

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

* * * * *

TITLE II

LANDS BENEATH NAVIGABLE WATERS WITHIN STATE BOUNDARIES

SEC. 3. [43 U. S. C., Supp. V, 1311] RIGHTS OF THE STATES.—

(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering

such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on the effective date of this Act, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

(c) The rights, powers, and titles hereby recognized, confirmed, established, and vested in and assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease, and such rights, powers, and titles are further subject to the rights herein now granted to any person holding any such lease to continue to maintain the lease, and to conduct operations thereunder, in accordance with its provisions, for the full term thereof, and any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued such lease: *Provided, however,* That, if oil or gas was not being produced from such lease on and before December 11, 1950, or if the primary term of such lease has expired since December 11, 1950, then for a term from the effective date hereof equal to the term remaining unexpired on December 11, 1950, under the provisions of such lease or any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of

the State issuing, or whose grantee issued, such lease * * * ;

* * * * *

SEC. 4. [43 U. S. C., Supp. V, 1312] SEAWARD BOUNDARIES.—The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

* * * * *

SEC. 9. [43 U. S. C., Supp. V, 1302] Nothing in this Act shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the

area of lands beneath navigable waters, as defined in section 2 hereof, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed.

* * * * * * *

11. Outer Continental Shelf Lands Act, August 7, 1953, 67 Stat. 462, 43 U.S.C., Supp. V, 1331-1343.

AN ACT

To provide for the jurisdiction of the United States over the submerged lands of the outer Continental Shelf, and to authorize the Secretary of the Interior to lease such lands for certain purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Outer Continental Shelf Lands Act".

SEC. 2. [43 U. S. C., Supp. V, 1331] DEFINITIONS. —When used in this Act—

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 2 of the Submerged Lands Act (Public Law 31, Eighty-third Congress, first session), and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

* * * * * * *

SEC. 3. [43 U. S. C., Supp. V, 1332] JURISDICTION OVER OUTER CONTINENTAL SHELF.—(a) It is hereby declared to be the policy of the United States that the subsoil and seabed of the outer Continental

Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act.

(b) This Act shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected.

SEC. 4. [43 U. S. C., Supp. V, 1333] LAWS APPLICABLE TO OUTER CONTINENTAL SHELF.—(a) (1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this Act.

(2) To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary [of the Interior] now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of the effective date of this Act are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of

such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

* * * * *

SEC. 8. [43 U. S. C., Supp. V, 1337] LEASING OF OUTER CONTINENTAL SHELF.—(a) In order to meet the urgent need for further exploration and development of the oil and gas deposits of the submerged lands of the outer Continental Shelf, the Secretary [of the Interior] is authorized to grant to the highest responsible qualified bidder by competitive bidding under regulations promulgated in advance, oil and gas leases on submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of subsection (a) of section 6 of this Act. * * *

* * * * *

12. Republic of Texas boundary act, December 19, 1836, 1 Laws of the Republic of Texas, p. 133.

AN ACT To define the boundaries of the Republic of Texas.

SEC. 1. *Be it enacted by the senate and house of representatives of the republic of Texas, in congress assembled,* That from and after the passage of this act, the civil and political jurisdiction of this republic be, and is hereby declared to extend to the following boundaries, to wit: beginning at

the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the forty-second degree of north latitude, thence along the boundary line as defined in the treaty between the United States and Spain, to the beginning: and that the president be, and is hereby authorized and required to open a negotiation with the government of the United States of America, so soon as in his opinion the public interest requires it, to ascertain and define the boundary line as agreed upon in said treaty.

13. Boundary provision of the Florida Constitution of 1868, Fla. Laws (1868), 193, 195; 25 Fla. Stats. Anno. 411, 413.

ARTICLE I

BOUNDARIES

The boundaries of the State of Florida shall be as follows: Commencing at the mouth of the river Perdido; from thence up the middle of said river to where it intersects the south boundary line of the State of Alabama, and the thirty-first degree of north latitude; then due east to the Chattahoochee river; then down the middle of said river to its confluence with the Flint river; from thence straight to the head of the St. Mary's river; then down the middle of said river to the Atlantic ocean; thence southeastwardly along the coast to the edge of the Gulf Stream; thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land, to a point west of the mouth of the Perdido river; thence to the place of beginning.

APPENDIX B

1. Letter from John Foster Dulles, Secretary of State, to Herbert Brownell, Jr., Attorney General, June 15, 1956.

DEPARTMENT OF STATE
WASHINGTON

JUNE 15, 1956.

DEAR MR. ATTORNEY GENERAL: I refer to your letter of April 26, 1956, concerning proceedings now pending before the Supreme Court of the United States between the Federal Government and the State of Louisiana. You state that the purpose of the suit is to determine the extent of the submerged off shore area which the United States granted to the State by the Submerged Lands Act of May 22, 1953 (67 Stat. 29, 43 U. S. C. (1952) Supp. II, secs. 1301-1315). You point out that this issue involves the location of the maritime boundary of the United States and you request a statement of the position of the United States concerning the extent of its territorial waters, particularly during the early years of its history.

When the Submerged Lands Act was under consideration in Congress, the Department of State testified before the Senate Committee on Interior and Insular Affairs on the foreign relations aspects of the proposed legislation, including the extent of the territorial waters of the United States. The Department testified that the United States had traditionally supported the three-mile limit, that is, a breadth of territorial waters of three nautical miles measured from low water mark on the shore. (See Hearings on S. J. Res. 13 and other bills before the Committee on Interior and Insular Affairs, United States Senate, 83d Congress, 1st

Session, February 16-27, March 2-4, 1953, p. 1051.)

This position is supported by a long line of court decisions, treaties and statements of the Executive going back as far as 1793, when this Government first had to face the question of the breadth of territorial waters. At that time, international practice regarding the breadth of waters over which a coastal State could exercise control was not fully developed. The expression "territorial waters" was not yet in current use. Frequently, the projection of territorial sovereignty into adjacent waters took the form of an assertion of a right to prohibit hostilities between foreign vessels in the waters under the control of the cannons on the shore (neutrality). The United States was perhaps the first nation to translate the concept of the utmost range of a cannon ball into a specific distance fixed at three miles, in a note to the French Government of November 8, 1793, which read in part:

"It is certain that, heretofore, they [governments] have been much divided in opinion as to the distance from their sea coasts, to which they might reasonably claim a right of prohibiting the commitment of hostilities. The greatest distance, to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea-league. Some intermediate distances have also been insisted on, and that of three sea-leagues has some authority in its favor. The character of our coast, remarkable in considerable parts of it for admitting no vessels of size to pass near the shores, would entitle us, in reason, to as broad a margin of protected naviga-

tion, as any nation whatever. Not proposing, however, at this time, and without a respectful and friendly communication with the Powers interested in this navigation, to fix on the distance to which we may ultimately insist on the right of protection, the President gives instructions to the officers, acting under his authority, to consider those heretofore given them as restrained for the present to the distance of one sea-league, or three geographical miles from the sea shores. This distance can admit of no opposition, as it is recognised by treaties between some of the Powers with whom we are connected in commerce and navigation, and is as little or less than is claimed by any of them on their own coasts." (Mr. Jefferson, Sec. of State, to Mr. Genet, the French Minister, I American State Papers, For. Rel., 183).

The caution which led Jefferson to reserve for further consideration the claims of the United States in this matter continued to mark the position of this Government for a few years after the turn of the century. There are indications that our statesmen kept an open mind on the possibility of extending the limit, although they remained firm in their conviction that three miles was the smallest limit claimed by any nation and hence a limit which could not be questioned by any one. Secretary of State Pickering reaffirmed in 1796 the position of the United States that "our jurisdiction * * * has been fixed * * * to extend three geographical miles * * * from our shores" and Secretary of State Madison stated in 1807 that "there could surely be no pretext for allowing less [to the United States] than a marine league from the shore, that being the narrowest allowance found in any authorities on the law of nations" (I Moore, International Law Digest 702).

But this Government soon resolved any doubts it had in the matter in favor of a firm stand on a three-mile limit and opposition to claims to broader limits. From the outset, it had adopted freedom of the seas as an axiom of its foreign policy. It rapidly perceived that, in order to give maximum effect to this policy, it must adhere strictly to the three-mile limit. This position was clearly illustrated in a note addressed by Secretary Seward to the Spanish Minister on December 16, 1862. Spain claimed a jurisdictional belt around Cuba of six miles. The Secretary pointed out that the principles bearing on the issue were the principle "that the sea is open to all nations" and the principle that a nation is entitled to exercise its sovereignty in a portion of the sea adjacent to its coasts. He stated that the exercise of this sovereignty abridged the "universal liberty of the seas". And he concluded, after a review of the practice of states regarding the limit to which they were entitled to exercise this sovereignty:

"Impressed by these general views, the United States are not prepared to admit that Spain, without a formal concurrence of other nations, can exercise exclusive sovereignty upon the sea beyond a line of three miles from the coast, so as to deprive them of the rights common to all nations upon the open seas". (I Moore, International Law Digest 706, at 707-708.)

The position of the United States on the three-mile limit has remained unchanged to this day, and at no time has this Government followed a different policy regarding the extent of its territorial waters in the Gulf of Mexico. Freedom of the seas continues to be essential to the national interests of the United States, particularly in matters of

commerce, fishing and defense. Free sea lanes and air routes over the seas are essential to the maintenance of the pre-eminence of the United States in commercial shipping and air transport. Free seas are essential to the prosperity of its fishing industry. And it is its traditional concept of defense that the greater the freedom and the range of its warships and aircraft, the more effectively its security interests are protected. Compromise of the position of the United States on the three-mile limit would necessarily compromise, if not force abandonment, of its opposition to claims of foreign states to greater breadths of territorial waters, and in turn impair the protection of national interests which the policy of freedom of the seas is designed to achieve. It is no exaggeration to say that, in view of the serious attacks which are now being made upon the freedom of the seas in various parts of the world, the maintenance of the traditional three-mile policy is more than ever a matter of vital interest to the United States.

Sincerely yours,

(S.) JOHN FOSTER DULLES.

2. Letter from Christian A. Herter, Acting Secretary of State, to William P. Rogers, Attorney General, May 9, 1958.

DEPARTMENT OF STATE, WASHINGTON

May 9, 1958.

DEAR MR. ATTORNEY GENERAL:

On April 26, 1956, in connection with the case of *United States* v. *Louisiana*, now pending in the Supreme Court, Attorney General Brownell asked the Secretary of State for a statement of this nation's policy and position regarding the width of its marginal sea in the Gulf of Mexico. He replied on June 15, 1956, reviewing our historic adherence to the three-mile rule, both in the Gulf of Mexico and elsewhere, and declaring it to be the position of the United States that international law sanctions no greater limits. The position stated in that letter continues in effect today. The United States claims only three miles for itself and recognizes only three miles for foreign states. Our position has not been modified in any way by anything that occurred at the United Nations Conference on the Law of the Sea, recently concluded at Geneva.

Sincerely yours,

(S.) CHRISTIAN A. HERTER,
Acting Secretary.

The Honorable,
WILLIAM P. ROGERS,
Attorney General.

3. Excerpts from the speech of the Honorable Arthur H. Dean, Chairman of the United States Delegation, in the First Committee of the Law of the Sea Conference, Geneva, March 11, 1958, 38 Dept. of State Bulletin, No. 980, pp. 574-581, April 7, 1958.

It is related that Queen Elizabeth of England said in 1580: "The use of the sea is common to all; neither can a title to the ocean belong to any people or private persons, forasmuch as neither nature nor public use permit any possession thereof." So we who "go down to the sea in ships" and do business in great waters and see the wonders of the Lord in the deep are greatly concerned about these matters.

For, and I state it merely as a fact, the coastlines of the continental United States stretch for some 12,000 miles, and the coastlines of Alaska and the Aleutian Islands, Hawaii, and Puerto Rico add many more miles to this figure. Our merchant fleets traverse the seven seas, and our merchant-fleet tonnage of approximately 23,500,000 tons is about 22 percent of the world figures set forth in Lloyd's Register as of July 1, 1957. Consequently, our interest in the law of the sea and in this conference is not a casual one.

Our views are based on historic practice and experience with rules that have been tested by time. They have been reached, I hope, in good spirit, with the voice of reason and with due regard to the sometimes conflicting requirements of stability and change. They truly represent our best efforts to reach just and equitable solutions to common problems.

But we are dealing in some respects with a mathematical equation. For whatever you add to an individual state's territorial waters you sub-

tract inevitably from the high seas, the common property of all, large or small. The law of mathematics is, I am afraid, as binding on new nations as on old.

Let us examine together a few of our common problems.

Now, for example, if you lump islands into an archipelago and utilize a straight baseline system connecting the outermost points of such islands and then draw a 12-mile area around the entire archipelago, you unilaterally attempt to convert into territorial waters or possibly even internal waters vast areas of the high seas formerly freely used for centuries by the ships of all countries. And, unhappily, you lend encouragement to others to go and do likewise.

Thus the threat to the free and continued use of the high seas becomes enormous. And you can't disguise it by labeling what is essentially restrictive, and detrimental to the general welfare, as being progressive; or disguise the shackling of liberty for all by calling it "new thought" or "realistic development" or "progress" or the "new concepts of new states."

By asking us to be generous and to accept such restrictions in the freedom of the seas, you ask us to be generous with other persons' property, held in common for the benefit of all peoples.

But, just as my delegation is prepared to listen with understanding and sympathy to the expression of views of the smallest countries, be they landlocked or nonmaritime, and to their problems, so too my delegation expresses the hope that its views and those of other maritime powers with experience will be received fully and fairly in the light of their intrinsic merits.

The position of the United States of America concerning the breadth of the territorial sea is determined by its attitude toward the doctrine of the freedom of the seas. There is no doctrine of international law more universally recognized than the principle that the high seas are the common property of all and that no part of them can be unilaterally appropriated by any state to its own use without the concurrence of other states.

In this day of improved methods of transportation and communication, which have served to bring countries ever closer together, it is vitally important that the international highways of the sea and of the superjacent air should not be brought under the restrictive domination or control of individual states, however worthy their motives. I repeat, any such proposals which would result in restricting the freedom of the seas would not be progress but rather retrogression.

We sincerely believe that this doctrine, in its widest implication, is the principle fairest to all, large and small. The doctrine of the freedom of the seas is not a mere historical relic of the so-called time when maritime law was developed by the great powers.

There have been suggestions here that the interests of small and large states in these matters are different.

The history of the United States and of the 3-mile limit is a living refutation of such suggestions.

Almost from the day of its emergence from colonial status into independent statehood, the United States of America has stood for freedom of the seas. In notes drafted by Thomas Jefferson in 1793 in his capacity as Secretary of State in the course of "friendly conferences and explanations

with other powers," and basing his decisions in part on treaties already entered into, he announced that the United States was for a 3-mile limit of territorial sea.

It was important to the United States as a newly emerged country of approximately 3,900,000 people to be assured of freedom for its ships and its nationals on the high seas. And it has fought to maintain that freedom. Freedom is important to all, perhaps of even greater importance to the small state than to the large. This is no less true of freedom of the seas than of any other freedom.

We are grateful to the distinguished delegate of Peru for noting my country's consistent advocacy of this principle through all stages of our historical development.

Of the many states which presently adhere to the 3-mile rule and have done so in the past, there are many small states. Indeed, the doctrine was born of the desire of a small state for equal rights on the high seas.

Let us examine briefly some the benefits which are our common heritage in the high seas, since our decisions here may affect these priceless benefits. For purposes of illustration only, this preliminary discussion is limited to but three of the freedoms of the high seas declared in article 27 of the ILC draft.

The freedom of navigation on the high seas means the essential liberty of maritime transportation and communication unfettered by the requirement of consent by any foreign state. And the bridge of understanding which this creates between us was eloquently noted here by the distinguished delegate of Sweden.

To this freedom, sturdy fishing communities owe their livelihood. To this freedom many of us owe

our economic strength and our opportunity in other fields.

The merchant fleets of the world represent not only profit to commercial interests but the only means by which the essentials of life can be transported readily to countries where there is a market. For the most precious commodity is of little value if there is no market for it where it is found. It must be transported as cheaply as possible to its buyer. Thus, freedom of the high seas is as important to the seller or producer as to the buyer.

Ship bottoms have carried food, clothes, medicine, and indeed the very means of national survival to virtually every country here represented.

Now the question before us is, which breadth gives the maximum freedom of navigation of the high seas in keeping with the ever-increasing sea communications of the modern-day world—a 3-mile-limit territorial sea or a wider breadth?

It is idle to assert that because of the existence of the right of innocent passage freedom of navigation does not suffer by an extension of the territorial sea.

The United States of America attaches the utmost importance to this historic right and believes that an unequivocal declaration should be made in our articles thereon. The right of innocent passage in territorial waters, however, is itself a recognition of the fact that freedom of navigation is restricted by the existence of a territorial sea under state sovereignty. And the doctrine of innocent passage is an effort to alleviate that situation.

If, as some say, the peaceful passage of foreign vessels through their territorial waters is guaranteed as long and insofar as it is not contrary to the

sovereignty or harmful to the security of the coastal state, isn't there only a restricted right of innocent passage?

I submit that this extension of territorial waters to greater limits with this qualification as to the right of innocent passage is not equivalent to the right previously existing on the high seas.

Does this movement to wider breadth for the territorial sea, with consequent encroachment upon the high seas, represent progress? Isn't keeping the high seas as large an area as possible in the interests of all people—*res communis,* as Grotius termed it—just as desirable a goal as it was when Grotius first advocated it in 1609?

For those vessels which seek to avoid contact with the territorial sea for reasons of their own or because such contact may be forbidden by the coastal state, the difficulties and uncertainties of navigation and piloting increase geometrically with extensions of the territorial sea beyond 3 miles.

Let us pause to examine a few hard facts common to us all that must be encountered if the territorial seas were extended to, say, 12 miles.

Many landmarks, for instance, employed in visual piloting still necessary for small craft of all states are just not visible at a range of 12 miles. Indeed, it is estimated that only 20 percent of the world's lighthouses have a range of 12 miles or more.

We are greatly concerned that this conference should not impose this pall of darkness and its frightening possibilities on small craft.

Moreover, radar navigation at 12 miles and beyond is of only marginal utility in most instances. This is so because many objects normally used for

radar navigation are unidentifiable at such distance. Further, it would be impossible for many small boats such as fishing boats to anchor at depths normally found outside a 12-mile limit, as they could not carry sufficient cable or appropriate anchors.

Thus, safety of navigation is greatest with a 3-mile limit.

Efforts by merchant ships to avoid violating the coastal states' regulations in extended territorial waters will inevitably lead to longer, less economical runs and to increased shipping costs, less revenues to the producers of the products carried, and higher prices to the consumer. Economic dislocations and substitution of products are inevitable.

These considerations are not to be lightly dismissed. As such difficulties materialize, the increased shippers' costs will inevitably be borne by the countries dependent upon seaborne commerce for their economic existence.

In addition, any extension of the breadth of the territorial sea would impose a burden on the coastal state to patrol effectively the larger sea. This burden would carry with it an increase in the fiscal expenditures of the coastal state stemming from an increased workload, in both merchant-marine safety and law enforcement.

For example, the United States estimates an approximate initial capital outlay of $8,000,000 and an increase in annual operating cost of $1,500,000 per each hundred miles of coast, in the case of an extension of the territorial sea from 3 to 12 miles, or an increase of annual expenditure of some $180,000,000 for our continental coastlines alone. These figures to me are somewhat appalling.

While on the matter of costs, I wonder how many other nations have made estimates of their own as to what it would cost to extend navigational aids such as buoys, gongs, whistles, fog signals, groaners, channel markers, and the like to 12 miles and to change the necessary charts and piloting manuals which mariners must have on board when at sea. The figures would be very interesting. We would like to see them.

I submit, any failure by a state to exercise effective control over an area to which it has laid claim would risk the incurrence of international embarrassment to the state asserting the claim. Sporadic attempts at enforcement would have only the undesirable result of increasing international tension and perhaps in decisions unfavorable to the coastal state.

Now I realize there are certain facile attractions for a state neutral in time of war in having the right to extend the territorial seas to a 12-mile limit. However, in the unhappy event of a future conflict, which God forbid, neutrality and the international law pertinent thereto will be matters which may have to be taken into account.

Now, of course, if it could safely be assumed that all contending belligerents would respect the territorial sea of a neutral, the possibility of hostile incursions into neutral coastal areas would be materially lessened. But I think, rather, the possibility, at least, cannot be excluded that certain belligerents in any future war would be even less inclined to accord complete respect to a 12-mile coastal belt of neutral waters than to a 3-mile zone —particularly in view of the probable inability of the neutral to control the broader belt.

The problem of the neutral with a 12-mile territorial sea in maintaining its neutrality is further demonstrated by the greatly increased ocean areas which would have to be patrolled to insure the inviolability of its sovereignty.

The possible attractiveness of neutral waters to a belligerent may be easily demonstrated. For reasons of its own safety a submarine will seldom attempt to operate within 3 miles of shore. The hazards to a submerged submarine are usually lessened materially as the distance from shore increases.

Thus, a belligerent submarine would look upon a neutral with a broad territorial sea as offering a particularly attractive haven if she were hard pressed by antisubmarine aircraft or surface vessels of the enemy operating on the high seas which could not legally enter such territorial sea. Further, other combatant types might be enticed to enter the territorial waters of a neutral hoping to find a safe refuge from pursuit by enemy forces.

There is another factor which would serve to lure belligerent vessels within 12 miles of a neutral coast. For reasons already discussed, navigation at a distance of 12 miles from shore is less exact and almost impossible in case of fog. Captains and masters are accordingly strongly disposed to navigate at a distance less than 12 miles from charted navigational objects on shore.

In view of all of these considerations, violation of the neutrality of a state with a 12-mile territorial sea in time of international conflict would appear to be increased rather than otherwise.

I turn now to the second of the freedoms I shall discuss.

Coastal states almost universally deny to nationals of other states the right to fish in their ter-

ritorial sea. If that territorial sea is extended and the high seas thereby diminished, a great and inexpensive source of food in that area is thereby denied to other people in the world. And this would occur at a time when population figures are mounting at an ever-increasing rate.

It is estimated that a general extension of the territorial sea by 1 mile reduces the area of the high seas, where freedom of fishing and other freedoms exist, by an estimated 280,000 square miles. Likewise, it is estimated that a general extension of the territorial sea by an additional 9 miles would reduce the area of the high seas by 2,500,000 square miles, an area roughly equal to the size of the United States of America.

I would suggest that expressing this reduction in terms of percentage is most misleading, as a mile near the coast both from a navigational and fishing standpoint is far more important relatively than a greater number of miles on the high seas. Further, a large percentage of the world's catch of fish is taken off or near coasts, reefs, shelves, shoals, or banks. For example, approximately 56.7 percent of the fish caught off the United States coast are caught within a breadth of 3 miles.

Now, unilateral extensions of the territorial sea in general or in specific areas violate the existing rights of all other states. Of this there can be no doubt.

Only recently, an example of this was provided in the Far East, where by the drawing of an arbitrary line 115 miles long enclosing thousands of square miles of sea and the assertion of a 12-mile territorial sea beyond that line, an area traditionally open to all states, large and small, was suddenly claimed by unilateral act of the coastal state to be *mare clausum* and off limits to all other

peoples, some of whom had traditionally sought their means of living in the area.

So far as I am informed no other country in the world asserts exclusive right to a so-called bay with a mouth of this size.

My Government has filed formal protests to this declaration.[101a]

I have already adverted to the situation created by the Indonesian declaration of December 1957.

Obviously if in the name of progress we were to consider that the 3-mile limit is obsolete, just where would the matter stop if each state were free to suit its own economic or alleged security interests? The free seas would soon look like a patchwork quilt with "no trespassing" signs posted in all directions to bewilder the poor mariner.

I now want to discuss the third freedom of the seas.

The freedom to fly over the high seas of the world, which belongs to all peoples and states alike, is denied entirely in the airspace over the territorial sea unless the coastal state gives its consent. The vital importance of the right of overflight is spotlighted in the airspace over international straits in accordance with the Convention on International Civil Aviation of December 7, 1944, which became effective as to 73 states on April 4, 1947.

Let me point out—there is no right of innocent passage for aircraft over territorial seas as distinct from the right of innocent passage for vessels through such seas. Thus any extension of the territorial sea beyond 3 miles will result *pro tanto* in diminishing freedom of flight.

[101a] Department of State Bulletin of Mar. 24, 1958, p. 461.

The effect of this in straits and other narrow seas might well be pondered closely by looking at an atlas of the world. I suggest that you take a pair of dividers and measure the distance across the Straits of Gibraltar north and south. If you extend territorial waters to 6 miles each way, there is no area of high seas remaining. Or I suggest you try extending various coastlines all over the world in each direction by 6 or 12 miles and draw comparable lines accordingly around islands or, if you choose, archipelagos, and see what you have done to the freedom of the high seas, the right to overfly and the right to fish.

As the distinguished delegate from Greece so clearly pointed out, an extension of his country's territorial sea to 12 miles would be equivalent to closing the Aegean Sea.

These are hard, cold facts which must be examined by new states as well as the so-called great powers.

Now, sir, and distinguished delegates of nations new and old, we are still governed by the physical facts of the universe. The number of feet in a nautical mile and the parallels of latitude and meridians of longitude are fixed. And as for the breadth of 3 miles for territorial sea being obsolete because of the doctrine of hot pursuit, that doctrine, I submit, is just as relevant to a 12-mile as to a 3-mile zone. It all depends on where the pursuit starts.

I have mentioned but a few of the benefits which the freedom of the high seas bestows on all states. Let us consider carefully chart by chart, strait by strait, and island by island any proposal to set in motion or accelerate the erosion of these freedoms for some supposed temporary or local benefit.

Let us also not lose sight of the fact that rights create obligations and an increase in territorial limitations is no exception. For there can be only loss of national prestige for a state which provides inadequately for the needs and safety of international navigation in its territorial water or is unable to assert full sovereign control over a wide territorial sea.

Finally, a word to those states advocating the permissibility of a state setting the breadth of its territorial sea from 3 to 12 miles according to its own opinion as to its own needs.

This position in the opinion of my delegation is exactly equivalent to a vote for 12 miles. Indeed, it is, I think, a myth to say that the adoption of article 3, subdivision 2, of the ILC draft gives nations flexibility up to 12 miles, because it is readily apparent, I believe, that the maximum inevitably would tend to become the minimum.

Because navigators must not only know where they are but where they have a right to go and what they can do, I submit it is not plausible to expect that states which respect the equal rights of others to the high seas up to 3 miles from their shores will long suffer being barred from a sea area adjacent to the shores of others four times that wide. Increase may breed increase and restriction restriction, and the chain reaction thus set in motion will result in the maximum claim by all.

Moreover, as there is neither logic nor tradition in a 12-mile limit, what reason is there to expect termination there? Carried to its logical conclusion such course of action will run its due course, and the freedom of the high seas, so valuable to us all and especially to the small countries, will vanish —and be gone with the wind.

In such a situation, isn't it at least possible to speculate that those with large economic resources may be able to fend for themselves better than the small?

The legal case for the 3-mile or 1-marine-league limit has been cogently set forth here by the distinguished delegates of a number of other states, including the distinguished delegates of France, Great Britain, Greece, the Netherlands, and Japan, a number of whom have made reference to the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries Case*,[101b] to the effect that the validity of the delimitation of the territorial sea with respect to other states is determined by international law although international law must, of course, be implemented by municipal legislation. It is the view of my Government, without elaboration or citation of authorities or making an extended legal argument at this time, that the 3-mile rule is established international law; that it is the only breadth of territorial waters on which there has ever been anything like common agreement; and that unilateral acts of states claiming greater territorial seas are not only not sanctioned by any principle of international law but are indeed in conflict with the universally accepted principle of the freedom of the seas.

There is universal agreement that each state is entitled to a territorial sea of a breadth of 3 miles, or 1 marine league. But this cannot be said of any claim to a greater breadth, each of which claims has been protested by many states. This fact was recognized in the report of the International Law Commission covering the work of its seventh session when it stated that "international law does

[101b] I.C.J. Report, Dec. 18, 1951, pp. 116, 132.

not require states to recognize a breadth [of territorial sea] beyond three miles." [101c]

The United States regards this to be the true legal situation. Further, it considers that there is no obligation on the part of states adhering to the 3-mile rule to recognize claims on the part of other states to a greater breadth of territorial sea.

Since the right of states to a 3-mile territorial sea is universally recognized, and since in its view the greatest freedom of the seas is in the interest of all states, large and small, the delegation of the United States of America proposes that article 3 of the ILC draft be changed to an unequivocal declaration of restraint that the breadth of the territorial sea shall not exceed 3 miles or 1 marine league.

* * * * *

4. Speech of the Honorable Arthur H. Dean, Chairman of the United States Delegation, in the First Committee of the Law of the Sea Conference, Geneva, April 16, 1958.

I have the honor at this time to place before this committee of the Conference on the Law of the Sea, a new proposal in the name of the United States of America.

This proposal is put forward by my government in the firm belief that it contains the essential elements of a just and honorable solution to the issues related to the breadth of the territorial sea.

It is also, if I may say so, a realistic compromise.

In my view this proposal deserves and should attract the support of all States who sincerely desire to see this conference succeed. To that end, it

[101c] U.N. doc. A/2934, p. 16.

is necessary that we here reach agreement on the most important single issue before this conference —the breadth of the territorial sea—in which sea a State exercises sovereign rights.

This is one of the most important of all the conferences that have been convened since the end of World War II.

We are meeting here under the auspices of the United Nations, the members of which are dedicated to the development of international law and universal respect for its principles.

We have here an outstanding opportunity to make a real contribution to the further development of international law and to the cause of peace.

Our task is to resolve conflicting views that have given rise to numerous disputes between friends, and which have resulted, in some instances, I regret to say, in the use of armed force.

The number of States in attendance at this conference is more than double the number that was represented at The Hague Codification Conference in 1930. Each and every one of the States here represented—old and new—shares equally in this opportunity to contribute to the welfare of the world.

It is already apparent, however, that to reach agreement we must compromise. Those who are interested in overseas fisheries, must recognize that there are coastal States who have moral and equitable claims to a larger share of the resources of the sea than has, up to now, been recognized by existing rules of international law.

These coastal States, in turn, must recognize that the position of the others is based upon morality, equity and recognized principles of international law.

We sincerely believe, for reasons that we have repeatedly advanced, that the maximum freedom of the seas is in the best interests of all States—large and small—old and new.

Our proposal constitutes an expression of our sincere desire to reconcile all of these diverse interests—with the high objective of bringing this most important conference to a successful and amicable conclusion.

How can we bring about such agreement?

What we propose, in substance, is that: That article 3 be amended to provide:

1. That the maximum breadth of territorial sea that may be claimed by any State is six miles.

Thus, if it so desires, any State can exercise sovereign rights up to six miles from its coast.

2. That the binding effect of any bilateral or multilateral arrangements as may exist, or be entered into, with respect to the regulation of fishing or the exploitation of the living resources of the sea, shall be recognized, as respects the parties thereto.

3. That subject to such arrangements the coastal State shall have, in a zone having a maximum breadth of twelve miles as measured from the applicable baseline, the same rights to regulate fishing and the exploitation of the living resources of the sea as it has in its own territorial sea.

4. This last mentioned right is subject to a proviso, which is that the nationals of any State whose nationals have fished regularly in that zone—within twelve miles of the applicable baseline—for the ten years last past, shall have the right to fish in that portion of the zone lying beyond the outer limit of the territorial sea of such coastal State. For example, if a coastal State chooses to declare that its territorial sea extends six miles

from the applicable baseline, that coastal State would be entitled under our proposal to regulate fishing and the exploitation of the living resources of the sea in an additional contiguous zone of six miles, or a total of twelve miles—consisting of, for example, six miles of territorial sea and six miles of fishing zone or three miles of territorial sea and nine miles of fishing zone.

The coastal State's right in that respect to regulate the fishing zone consisting of a part of the high seas would be conditioned, however, upon its recognition of the right of the nationals of other States whose nationals had been fishing regularly anywhere within twelve miles of its coast for the ten years last past to continue to do so in the outer six miles.

5. Nationals of other States who are permitted to continue fishing under the foregoing proviso will be bound in so doing to observe any and all conservation regulations of the coastal State as are consistent with the rules on fisheries adopted by this conference and other rules of international law.

6. Our proposal further contemplates that any disagreement with respect to fisheries or exploitation of living resources of the sea arising between States under this article shall, at the request of any of them, be submitted to the arbitral procedures contemplated by articles 57, 58 and 59, unless the parties agree to another method of peaceful solution or unless some other satisfactory arbitral procedure is here agreed upon.

That—in brief outline—is the nature of our proposal.

It is submitted to you only after the most careful and painstaking thought at the highest levels of my government.

The proposal relates to the limits of the territorial sea—one of the most vital issues before this conference. It represents a change in the position that my government has maintained consistently since 1793.

We are making this proposal, at what we regard as a very real and substantial sacrifice of our own interests. Other than the common good we have nothing to gain out of it.

We do so in full confidence that you will recognize that our proposal constitutes the basis upon which all of us working together can achieve fruitful agreement at this conference.

With your permission I should now like to emphasize the features of the proposal being advanced by my government which, in our view, make it a realistic and, as well, a just solution to our difficulties.

First, in recognition of the strong desire of many States for diverse reasons to extend the breadth of their territorial sea, the United States is prepared to recognize the right of any State to claim a maximum six miles of territorial sea.

You may well ask whether this represents any change in our firmly held conviction that a maximum three-mile limit is best for us and best for all?

It does not. In our own interests we have no wish to change.

Our proposal represents, instead, our honest effort to find a common ground with those of you who sincerely disagree with us. That is the spirit of compromise, which can be achieved only through sacrifice on both sides.

Why,—it may also be asked—have we submitted this proposal rather than continue our support for the Canadian proposal—offered and supported

in the same spirit of compromise—under which the three-mile limit would be preserved.

We have done this with regret—sincere regret—because we were convinced that more was needed to reach agreement among all the States represented here.

Second, we have made a sincere attempt to reconcile the conflicting interests of those coastal States who desire to control a larger share in the resources of the seas and the interests of those States who desire the broadest possible freedom of the seas.

In substance, the coastal State obtains the right to extend its zone of fishing regulation up to twelve miles from its applicable baselines with the right to proclaim conservation measures throughout the zone.

In turn the coastal State recognizes a continuing right in nationals of other States who have been fishing within the zone regularly for a reasonable period of time,—say ten years—to continue to fish in that portion of the zone beyond its territorial sea.

Thus coastal States who have had a three-mile territorial sea, may under our proposal extend their zone of sovereignty control by three miles and may regulate fishing for an additional six miles.

Although the high seas are narrowed by this proposal, it will not, we are confident, result in the destruction by exclusion of vitally important national fishing efforts, nor will it require any country drastically to change its eating habits because of the unavailability of particular types of fish.

Compromise is a two-way street.

We are, we believe, fully aware of our own problems.

We have done our best to go far in meeting the stated requirements of other States. I do believe that after you have carefully studied our proposed revision of article 3, you will agree with us that we have sincerely sought to offer to each of you the best accommodation that is consistent with the realities of the situation.

And also—and this is most important—we believe we have dealt intelligently with the urgent necessity that this conference be brought to a successful conclusion.

In proposing to depart from a three-mile limit for the territorial sea, the United States of America, as one of the strong exponents of the three-mile territorial sea, has taken an historic step in order that we may reach agreement here.

This was done with full realization of the serious implications of the action taken by my government on the public and private interests of our nationals throughout the world.

This is a solemn occasion. Therefore, I feel fully justified in calling upon each of the States represented at this conference unselfishly to re-examine its own position.

We urge you and your government to consider your position carefully and to join with us in agreement upon the most important single issue before this conference.

We have been impressed by the number of States here represented who have expressed and demonstrated a real desire to accommodate their national interests to the far-seeing objective of a compromise leading to accord. We believe that that objective is within our grasp. We believe that you agree with us and will take action accordingly.

I believe that as intelligent men met here to chart the development of international law we shall rise

to this challenge and achieve agreement on this issue.

In so doing we shall have achieved a milestone in the development of international law of which we can all be proud.

5. Statement by the Honorable Arthur H. Dean, Chairman of the United States Delegation, at the Law of the Sea Conference, Geneva, April 28, 1958.

In putting before this Conference the United States proposal relating to the breadth of the territorial sea and to exclusive fishing rights in a contiguous zone constituting a part of the high seas, under certain limitations, recognizing certain rights of others than the coastal state, I made it clear that the United States regarded this a realistic compromise, that it was made at considerable sacrifice to United States interests.

Our proposal was made in a sincere effort to meet other countries points of view with the sole purpose of achieving international agreement on these important matters.

It was an effort to reconcile the diverse and often conflicting interests of those coastal States desiring a larger share in the resources of the seas off their coasts and the interests of those States desiring the broadest possible freedom of the seas.

We greatly appreciate and wish to thank all those who supported our proposal, which received 45 votes, or some 7 votes short of the two-thirds majority required and yet considerably greater support than any other proposal on this subject. Every country must be the judge of its own position and needs and while we are disappointed we have nothing to say about the decision made here.

Our offer to agree on a six-mile breadth of territorial sea, provided agreement could be reached on such a breadth under certain conditions, was

simply an offer and nothing more. Its non-acceptance leaves the pre-existing situation intact.

We are happy with the three-mile rule. In our judgment it is the principle giving the greatest opportunity to all nations, large and small, new and old, coastal and landlocked, because it is the doctrine most consistent with freedom of the seas, a time-tested and universally recognized principle.

We have made it clear from the beginning that in our view the three-mile rule is and will continue to be established international law, to which we adhere. It is the only breadth of the territorial sea on which there has ever been anything like common agreement. Unilateral acts of States claiming greater territorial seas are not only not sanctioned by any principle of international law, but are, indeed, in conflict with the universally accepted principle of freedom of the seas.

Furthermore we have made it clear that in our view there is no obligation on the part of States adhering to the three-mile rule to recognize claims on the part of other States to a greater breadth of territorial sea. And on that we stand.

While we consider that the three-mile rule is existing international law, nevertheless we are still optimistic that upon reflection the great majority of our good friends in the international community will come to realize that international agreement on the breadth of the territorial sea and on fishing rights is necessary in order that a regime of law may be effected and that the diverse and often conflicting interests of national States may not jeopardize the peace of the international community.

To this end we pledge our cooperation.

We sincerely believe that such international agreement is possible and we shall continue to lend our efforts to that end.

Presidential Proclamation No. 2667, September 28, 1945, 10 Fed. Reg. 12303, 59 Stat. 884:

Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A Proclamation

Whereas the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and

Whereas its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable or will become so at an early date; and

Whereas recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and

Whereas it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be

regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources;

Now, therefore, I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf.

Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

In witness whereof, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done at the City of Washington this 28th day of September, in the year of our Lord nineteen hundred and forty-five, and of the Independence of

the United States of America the one hundred and seventieth.

[SEAL] HARRY S. TRUMAN.

By the President:

DEAN ACHESON,
Acting Secretary of State.

APPENDIX D

Excerpts from the Senate debates on the Submerged Lands Act, showing the congressional intent to grant to the States no rights seaward of their boundaries.

Mr. CORDON. * * *

The philosophy of the joint resolution is limited to the areas of the States as they were when the States came into the Union, or as that area was thereafter approved by Congress, or to an area 3 miles from their coastline. [99 Cong. Rec. 2620.]

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Mr. DOUGLAS. Does the Senator from Oregon believe that if the proposed language is adopted Texas will have paramount rights in the submerged lands seaward from the low-water mark 10½ miles out?

Mr. CORDON. Texas will have title out to its legal, existing boundary line. [99 Cong. Rec. 2621.]

* * * * *

Mr. DOUGLAS. Do I correctly understand the Senator from Oregon to say that these sums, amounting to approximately $62 million, which either are impounded under stipulation by the States or at present are held in escrow in the hands of the Federal Government, will revert to the States under this clause [Sec. 3(b)(3)] of the resolution?

Mr. CORDON. That is correct. However, I must say that applies only to funds which have been paid with respect to operations inside the State boundaries. A portion has been paid from operations outside or seaward of the State boundaries.

As to those funds, this joint resolution does not affect them in any way.

* * * * *

Mr. CORDON. The sole purpose of Joint Resolution 13, as it was introduced, was to place in the States by law the values underlying navigable waters, including 3 miles seaward, or wherever the boundary line of the States may be. The purpose by law was to place in the States what the States have enjoyed in fact and what they thought they had, and did have, in fact, up to the time of the California decision.

Mr. AIKEN. I believe the public has the impression that this resolution would give the States of Texas and Florida entire jurisdiction over the land beneath the sea for a distance of approximately 10 miles.

Mr. CORDON. That may be the case. I cannot say to the Senator that it is or is not. It depends on the validity of the claims made by the State of Texas and the State of Florida. I say they have made what appear to be good claims. But whatever they are, this resolution does not establish where they are, but it grants to the States affected the natural resources out to the State boundary.

Mr. AIKEN. This resolution does not attempt to fix the State boundary, does it?

Mr. CORDON. It does not. [99 Cong. Rec. 2694.]

* * * * *

Mr. AIKEN. Then the enactment of this joint resolution would still leave the way open for further controversy between the United States and the State of Texas as to the jurisdiction of the Continental Shelf. Is that correct?

Mr. CORDON. The resolution does not create any difficulty, nor does it do away with any difficulty as to the location of a State's sea boundary. It does confirm in the United States the jurisdiction and control of the natural resources in the subsoil and seabed of the Continental Shelf outside of State boundaries, as such boundaries are defined in the joint resolution.

Mr. AIKEN. But there is no way of telling, from this joint resolution, where such State boundaries may be.

Mr. CORDON. No, not as to either Florida or Texas. in regard to a three-league limit. * * * [99 Cong. Rec. 2694-1695.]

* * * * *

Mr. DANIEL. * * *

There is nothing in any bill which has been introduced in this session of the Congress that would claim for the States the ownership or the control of any lands beyond their historic and traditional boundaries. [99 Cong. Rec. 2695.]

* * * * *

Mr. HOLLAND. * * *

* * * By way of a brief summary, the general purpose of this measure as reported by the Interior and Insular Affairs Committee is to recognize, confirm, establish, and vest in and assign to the respective States the title and ownership of the lands and resources beneath navigable waters within their respective boundaries, as well as the right and power to manage, administer, lease, develop, and use these lands and resources in accord-

ance with applicable State law. * * * [99 Cong. Rec. 2744.]

* * * * *

It will be noted that this joint resolution provides that nothing therein shall be deemed to affect in any wise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Continental Shelf lying outside the boundaries of the respective States, and it confirms the jurisdiction and control of the Federal Government over those natural resources. In other words, this measure clearly emphasizes that nine-tenths of the submerged lands off the coast of the United States is under the control and jurisdiction of the Federal Government and that the other one-tenth, which lies inside the boundaries of the States, and immediately adjoining the coasts of the States, should be owned and controlled by the respective States. [99 Cong. Rec. 2744-2745.]

* * * * *

Completing my statement on this point, it seems to me that finally the fact has been understood by most persons—my mail so indicates—that this measure does not propose a grab on the part of the States of submerged resources beyond their seaward limits as States, but, instead, recognizes that the Federal Government does have whatever claim there is in that area and should be recognized as the proprietary owner thereof.

* * * * *

The questions presented by Senate Joint Resolution 13 have been fully considered by Congress several times, and I believe that this proposed leg-

islation, which relates solely to property within the States' boundaries, can and should be speedily passed if left unencumbered by other problems. As to offshore lands confirmed to the States, this measure is confined to those lands which extend out to the 3-mile limit with two exceptions. The State boundary of the west coast of Florida and the boundary of the entire coast of Texas extend 3 leagues into the Gulf of Mexico under their constitutions, which were approved many years ago by the Congress. The seaward boundary of each original coastal State is approved and confirmed by this measure as a line 3 geographical miles distant from its coast line, and it gives to those States whose boundaries do not formally extend 3 miles distant the opportunity to so extend them. I emphasize the fact that this joint resolution does not extend the boundary of any State beyond the 3-mile limit. If under this resolution Florida and Texas receive property values out to the 3-league limit in the Gulf of Mexico, as I believe they should and will receive them, it will be because they can establish as a fact that Congress approved their 3-league outer boundaries as long ago as 1845 in the case of Texas and 1868 in the case of Florida. [99 Cong. Rec. 2746.]

* * * * * *

Mr. PASTORE. Does the resolution, Senate Joint Resolution 13, make any claim whatever to a percentage of the oil that is beyond the so-called statutory boundary?

Mr. HOLLAND. None whatever. To the contrary, the joint resolution (S. J. Res. 13), in section 9—which I hope the Senator will read—makes it very clear that not only will all the natural resources in

the outer shelf appertain to the United States, but that the jurisdiction and control of everything in the outer shelf is confirmed in the United States. * * * [99 Cong. Rec. 2759.]

* * * * *

Mr. DANIEL. * * *

This proposed legislation would treat all the States alike, both inland and seaward, by continuing in effect one rule of State ownership, applicable to all lands beneath navigable waters within State boundaries. [99 Cong. Rec. 2830.]

* * * * *

Mr. DANIEL. The Senator does not doubt our sincerity in saying we are trying to limit the joint resolution to the historic boundaries, does he? [99 Cong. Rec. 2880.]

* * * * *

Mr. DANIEL. Mr. President, if the Senator from Illinois will yield to me, let me say that before the Federal Government ever made a claim to this land, the State of Texas did claim jurisdiction of the land beyond its historic boundaries to the edge of the Continental Shelf. The Supreme Court decided against us as to the ownership of that land.

The important thing now is not what we tried to do before but we are doing today. Please give us credit for the fact that we are not asking the Congress to restore to us anything except what is within our historic boundaries. [99 Cong. Rec. 2881.]

* * * * *

Mr. DOUGLAS. * * *

* * * But in the case of the offshore lands, what the joint resolution is doing is to give the States ownership in and title to the submerged lands out to the boundaries, wherever they may be. [99 Cong. Rec. 2915.]

* * * * *

Mr. HOLLAND. * * *

Furthermore, the Senator from New York will recall that when I introduced my measure at that time, I made it completely clear that I and the other Senators who joined me in sponsoring that measure did not agree even with the philosophy of Senator Connally, who thought that 37½-percent participation should be given to the State of Texas; but, to the contrary, we thought that the lands to be restored to the States should extend out only as far as the historic State boundaries. I am sure the Senator from New York will recall that that was the sentiment of the Senate at that time, and I believe it is the sentiment of the Senate now.

I do not believe the Senator from New York or any of the other Senators who oppose the pending joint resolution—all of whom have a perfect right to oppose it, of course—should seek to create from this RECORD the impression that any Member of the Senate, and particularly the sponsors of the so-called Holland joint resolution—40 of us—wishes to have the pending measure restore to the States the lands beyond the historic State boundaries. To the contrary, we are confining ourselves to that limit, and we have in our joint resolution a specific provision that, as to the areas without, they are confirmed to the Federal Government. I hope the Senator from

New York will understand that that is the purpose. [99 Cong. Rec. 2977.]

* * * * *

Mr. SALTONSTALL. * * *

Second, Senate Joint Resolution 13 will confirm the jurisdiction and control of the United States over the natural resources of the submerged lands extending seaward from the historic boundaries of the coastal States to the limits of the Continental Shelf. Since I have never believed that any State is entitled to claim more than it brought into the Union, I heartily support the action of the Committee on Interior and Insular Affairs in so amending Senate Joint Resolution 13 as to make clear that it does not enlarge the historic rights of any State at the expense of the Federal Government or of other States. [99 Cong. Rec. 2996-2997.]

* * * * *

Mr. HOLLAND. Inasmuch as we are making the legislative record at this time, I think it is extremely important to show what this section actually means. I should like to state what I understand it to mean and what I have always understood it to mean since the joint resolution was reported; and then I should like to see whether my friend, the Senator from New Mexico, will approve of my statement.

I understand that this section begins with the recital that:

Sec. 9. Nothing in this joint resolution shall be deemed to affect in anywise the rights of the United States to the natural resources of that portion of the subsoil and seabed of the Conti-

nental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 2 hereof.

That is a complete statement in itself, and I understand that it negatives any effect whatever which may have been produced up to this part of the joint resolution, adverse to the paramount rights of the United States appertaining to the area of the Continental Shelf outside of the State boundaries with reference to the seabed and the resources contained therein.

Then I understand that in order to make assurance doubly sure, an affirmative statement of the greatest clarity then appears. It is a completely affirmative assertion, namely, that all title—to the degree that title can be held—in the resources in the seabed of that same outside belt is confirmed in the United States. The wording of the last portion of that section is as follows: "all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed."

I understand that in the drafting of the last affirmative declaration, a studied effort was made to make it conform almost completely—as nearly as could be done in such a declaration—with the proclamation made in 1945 by the President of the United States, by which he had claimed for the United States, as appertaining to the United States, the resources in the outer seabed. I also understand that the peculiar wording used—for instance, the use of the word "appertain"—is drawn directly from the 1945 proclamation by the President of the United States.

So it is my understanding that, first by a negative statement, and, subsequently by an affirmative

statement of most far-reaching effect, the title, insofar as title can be held, and the complete control, the paramount right, and the claim of right to develop and to claim as our own every resource within the seabed outside the State boundaries, are affirmatively stated and confirmed as reposing in the United States.

Is that a fair statement of that section?

Mr. ANDERSON: That is a fair statement of the opinion of the Senator from Florida of that section, and I think I would try to concur with him. I know he is in favor, as I have heard him say many, many times, of asserting the rights of the United States to the part of the Continental Shelf which lies seaward of State boundaries. I think it would be very simple to cross out a negative sentence and start with the words, "the rights of the United States are confirmed." I do not want to confirm merely the jurisdiction and control by the United States. I want to confirm the rights of the United States in the area; and I thought it would be better to state that in a positive way. The distinguished Senator from Oregon agreed; but, in the interest of harmony in the committee, he did put it in the other form. [99 Cong. Rec. 3050-3051.]

* * * * *

Mr. HOLLAND. If this were the whole body of the resolution, I could not agree more completely with the distinguished Senator from New Mexico. But in view of the fact that other sections—all sections in this resolution prior to this particular one—relate to other important areas, it seems to me that there is very great value, and necessary value, in saving the meaning of those sections, and at the

same time making it clear that they do not pertain to or detract from the rights of the United States in the outer belt, outside of State boundaries. So that the Senator from Florida thinks that there is great value both in the negative statement and in the affirmative statement. But my reason for asking those questions was to make sure what the RECORD contains on this subject. But now there is a rather clear statement in the RECORD, I believe, from both the distinguished Senator from New Mexico and from myself, that at least the latter portion of this section does affirmatively claim every right asserted by the United States in the Executive order of the President in 1945, to the seabed, and to the development of the resources therein, outside the State boundaries and extending to the Continental Shelf.

Mr. ANDERSON: I may say to the distinguished Senator from Florida, who is an able lawyer and a very good expert on parliamentary language and legal phraseology, that what he has just said is encouraging and helpful, and I am very happy that he has made such a legislative declaration at this time. He is the author of a measure, and it will be helpful, I am sure in interpreting this sentence later, to have his specific statement regarding it.

* * * * *

Mr. ANDERSON. I see the Senator from Texas on his feet. I wish he would say something about it, because I know what he has said about it in committee, to the effect that the State of Texas is not claiming the Continental Shelf. If we could get something in the RECORD from him at this time, I think it would be helpful.

Mr. DANIEL. Mr. President, I thank the Senator from New Mexico. I am glad to make a statement. I heard his remarks, from the gallery. I merely wanted to explain why I asked that the negative approach be placed in this measure. It was because those who are sponsoring the Holland bill were being accused of claiming by this bill ownership beyond our historic boundaries as they existed at the time we entered the Union; and I thought if it were stated negatively that nothing in this bill should affect the rights of the United States beyond these historic boundaries, it would help the press and Senators and everyone else to know that this measure was not doing what some people had been claiming it would do. As I said in the statement which the Senator read, I did not object to an affirmative declaration, thereafter, but I wanted a negative one in it; and I do give it the same interpretation as did the Senator from Florida, that nothing in this measure grants to the States anything beyond their historic boundaries as they existed at the time those States entered the Union, and that this measure confirms the rights of the United States to the natural resources in the seabed and subsoil of the Continental Shelf beyond those historic boundaries.

I should like to add one further sentence. I regret that the negative approach we had in it, namely that nothing in this measure covers anything beyond historic boundaries, has not kept the Senator from Illinois and other Senators from arguing on this floor that by this measure we are trying to take in more, and are trying to take in all the Continental Shelf. However, I believe that the exchange here within the past few minutes should make it very clear that the authors of this

measure are not trying to give to the States, or to restore to the States, any lands outside their historic boundaries. [99 Cong. Rec. 3051.]

* * * * *

Mr. ANDERSON. Let me say to the Senator from New York that I did not mean to say that what the two Senators said with reference to the Continental Shelf solved all my problems with reference to boundaries. I have previously said that I thought the boundary section is an open-end commitment, and I suggest that it should be limited to 3 miles on the Atlantic and Pacific coasts and to 3 leagues in the Gulf of Mexico. The Senator from Texas indicated he would support that view.

I agree with the Senator from New York that it looks like an open-end commitment, but, as to the Continental Shelf, I do not think it is an open-end commitment. I think the statements of the Senators from Florida and Texas who have been identified with the two bills now under consideration are sufficiently strong as to constitute legislative history, and therefore will hereafter make it very difficult for anyone to make any claim to the contrary. [99 Cong. Rec. 3052.]

* * * * *

Mr. HOLLAND. * * *

Before I close this statement, I wish to remind all Senators on the floor that the Senator from Florida has consistently taken the position, with reference to areas beyond State boundaries, that he feels the Federal Government is the only one who has any proper, legal claim to the development of the seabed there, and he has never been willing to support any claim of right on the part of States

which were affected to have any interest there. [99 Cong. Rec. 4097.]

* * * * *

Mr. DANIEL. Is not the issue what the joint resolution covers instead of what some people in Texas might claim it to cover? And does not the resolution clearly confine itself to lands within the boundary lines as they existed when Texas and the other States came into the Union? Is not that the real question. I am sure the Senator will agree that the question is not whether I will be criticized at home, but whether the joint resolution covers anything beyond the historic boundaries. That, it seems to me, is the real issue, and I see no basis for the imaginary fears of the distinguished Senator from Illinois. [99 Cong. Rec. 4112.]

* * * * *

Mr. LONG. As a matter of fact, would not the proposed legislation simply give the States a right to establish what their historic boundaries actually were, and limit the States to 3 miles, or 3 leagues, in the Gulf of Mexico, if they could establish that their historic boundaries were that far out? [99 Cong. Rec. 4160.]

* * * * *

Mr. TAFT. * * *

I have no hesitation in saying that the Continental Shelf belongs to the Federal Government, because I believe that is the opinion of all Senators on this side of the aisle, and also of the Senators on the other side of the aisle. * * *

* * * * *

Mr. HOLLAND. * * *

I also completely approve the statement just made by the distinguished majority leader, the senior Senator from Ohio [Mr. Taft].

In conclusion, Mr. President, I wish to say that many of the Senators on this side of the aisle—in fact, I know of no exception, so far as that is concerned—feel just as does the distinguished majority leader, namely, that in the area outside of the State boundaries any proprietary values which are there belong to the Federal Government; and that in connection with the new bill which is to be reported the Federal Government must be made the dominant and controlling proprietor in any legislative provisions which I would support. I fully approve of the position just stated by the majority leader in that regard. [99 Cong. Rec. 4202.]

APPENDIX E

Excerpts from the Senate debates on the Submerged Lands Act, showing the congressional intent neither to change nor to declare the location of State boundaries beyond the three-mile limit.

Mr. DOUGLAS. Does the Senator from Oregon believe that if the proposed language is adopted Texas will have paramount rights in the submerged lands seaward from the low-water mark 10½ miles out?

Mr. CORDON. Texas will have title out to its legal, existing boundary line.

Mr. DOUGLAS. What is its legal boundary line?

Mr. CORDON. If the Senator wants an answer to that question, he will have to get it from the Supreme Court.

* * * * *

The resolution before the Senate does not deal with a determination of the boundary lines of the States. Those boundary lines do exist, but the Senator from Oregon will not usurp the prerogative, either of the Supreme Court of the United States to make a judicial determination, or of the legislative bodies of the States in question to make a legislative determination. * * * [99 Cong. Rec. 2621.]

* * * * *

Mr. HOLLAND. * * * If it were proposed by the pending measure to extend the line beyond the 3 geographic miles, the Senator from Illinois [Mr. Douglas] would be justified in having concern. The real fact is that the joint resolution does not make any such proposal. It merely provides with

complete clarity that no State which claims to have had a constitutional boundary going beyond 3 geographic miles at the time it was admitted to the Union, or claims to have a boundary that goes beyond that distance, and has been approved by the Congress since the time of its admission to the Union, will have those claimed rights affected in any way by this joint resolution. * * *

* * * * *

* * * all that is done under this measure, by means of the only provisions of it that apply to this question, is to preserve in status quo the exact rights, whatever they may be, of the State of Florida and, likewise, of the State of Texas or any other State to be heard upon this question.

The action taken by Congress in approving the so-called Holland joint resolution and this particular provision of it does not in itself operate to extend any boundaries for Florida, Texas, or any other State beyond the 3-geographic-mile limit. It simply preserves in status quo the rights of any States which may claim to bring themselves under this provision of the joint resolution. * * * [99 Cong. Rec. 2621-2622.]

* * * * *

Mr. CORDON. * * * Earlier this afternoon question was raised as to where the boundaries of these States may be in the sea. My answer then, which I reiterate now, is that the pending measure does not identify the location of those boundaries. It is not within the philosophy of the joint resolution that they be so identified. If they were so iden-

tified, that identification would have no legal effect. The joint resolution leaves that question where it found it.

* * * * *

The committee felt that this was a problem which it found unsettled, and a problem which it could not legally settle. Therefore, the committee treated it as it would have to be treated in any event, and left it there. That is my complete answer regarding all seaward boundaries of all States.

* * * * *

Mr. CORDON. Mr. President, the resolution speaks for itself. It need not affirm where the line is, deny where the line is, affirm that claims have been made, or deny that they have been made. It applies to the boundaries, not to the claims. [99 Cong. Rec. 2632.]

* * * * *

Mr. CORDON. * * * The resolution does nothing to the claim [of Florida]. It neither validates it nor denies it. The resolution deals with the boundaries of the State of Florida as is perfectly apparent from reading it. [99 Cong. Rec. 2633.]

* * * * *

Mr. CORDON. * * * The Senator from Oregon has indicated heretofore, and reiterates—although it is unnecessary—that this joint resolution does not locate the State boundaries. On page 570 of the hearings there appear certain tables which were presented by the United States Geological Survey and which indicate that someone in the

Federal Government has some idea of where traditional State boundaries are. The Senator from Oregon does not confirm the accuracy of the tables. He simply states they are printed at that point in the hearings. [99 Cong. Rec. 2694.]

* * * * *

Mr. CORDON. * * * Mr. President, since I am in charge of presenting the joint resolution, and therefore to some extent responsible for its explanation to the Senate, I may say again that I feel it incumbent upon myself to say that the joint resolution does not determine the location of original boundary lines. [99 Cong. Rec. 2696.]

* * * * *

Mr. CORDON. * * * The next provision is:

"Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond 3 geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore or is hereafter approved by Congress." [102]

Again, that is a spelling out of the fact that this joint resolution does not in any way question or attempt to prejudge the claim of a State, such as Texas or Florida, which claims rights beyond the 3-mile limit. That is a matter which is not sought to be resolved in this joint resolution.

* * * * *

[102] The phrase "or is hereafter" was deleted by an amendment introduced by Senator Holland. 99 Cong. Rec. 4114-4116.

Mr. HILL. * * * Then is it not true that we get back to the proposition that we do not know where these boundary lines are? We do not know where they are or what they are, do we?

Mr. CORDON. There has never been any question about what they are. We know what they are, but not where they are.

Mr. HILL. Do we know what they are?

Mr. CORDON. Yes; they are the boundaries of the States. [99 Cong. Rec. 2698.]

* * * * *

Mr. DOUGLAS. I should like to have the Senator from Oregon interpret the meaning of the phrase—

> Nothing in this section is to be construed as questioning, or in any manner prejudicing the existence of any State's seaward boundary beyond 3 geographical miles—

And so forth. If there is nothing in this section that questions such a boundary, and nothing that prejudices it, is it the understanding of the Senator that this phrase confirms it?

Mr. CORDON. It does not confirm; neither does it question or prejudice. That, I think, is perfectly clear. [99 Cong. Rec. 2699.]

* * * * *

Mr. HOLLAND. * * * I emphasize the fact that this joint resolution does not extend the boundary of any State beyond the 3-mile limit. If under this resolution Florida and Texas receive property values out to the 3-league limit in the Gulf of Mexico, as I believe they should and will receive them, it will be because they can establish as a

fact that Congress approved their 3-league outer boundaries as long ago as 1845 in the case of Texas and 1868 in the case of Florida. [99 Cong. Rec. 2746.]

* * * * *

Mr. DOUGLAS. Is it the understanding of the Senator from Florida that the resolution gives to Texas the claimed rights, as mentioned by the Senator from Florida, to the 10½-mile limit?

Mr. HOLLAND. I do not think the Senator uses the correct words. This resolution does not give anything to anyone; it simply recognizes the Texas limits, provided Texas can, as I believe it can, show that its limits were 3 leagues out before it was admitted into the Union, and that fact was made known to Congress and Congress approved it. The State of Texas is entitled to claim that right under the law.

To be a little more specific, I have always said, and I now repeat, that the joint resolution extends no State boundaries beyond the 3-geographical-miles limit. It simply leaves the 2 States in the status which they now occupy; and as to the only 2 States which the Senator from Florida knows will have any right beyond 3 miles, the States of Florida and Texas, the cases for Florida and Texas will have to be brought within the provisions of this resolution, based, in the one case, that of Texas, on action taken prior to 1845, on the part of the Republic of Texas, and action taken in 1845 by Congress in admitting Texas into the Union, along with its boundaries; and in the case of Florida, on action taken in 1868, to which the Senator

from Illinois has already adverted. [99 Cong. Rec. 2755.]

* * * * *

Mr. KUCHEL. I should say that, with respect to the State of California, the joint resolution merely places the boundaries as they existed when the State came into the Union, or as they may subsequently have been established in accordance with the language of a statute enacted by the Congress at a later date. * * *

* * * * *

* * * The question of a definition of boundaries by metes and bounds is something which is not, and in my judgment should not be made, a part of the joint resolution before us. [99 Cong. Rec. 2756-2757.]

* * * * *

Mr. KUCHEL. I think it would be within the purview of a court of competent jurisdiction to determine, in any instance, what actually are the boundaries of a littoral State. [99 Cong. Rec. 2757.]

* * * * *

Mr. LONG. * * * I submit to the Senator that the State of Louisiana has a right under the joint resolution only to establish what its boundary is and what its boundary has always been from the time it entered the Union, and that Florida and Texas have that right. The pending measure does not give to Texas, Florida, or Louisiana anything more than a boundary 3 miles out. It merely gives them

the right to prove, if prove they can, that the boundary goes beyond 3 miles.

* * * * *

Mr. HOLLAND. * * * the only way that any limit for any State could ever be fixed beyond 3 geographical miles under the proposed law would be by fulfilling the conditions prescribed, that is, by showing that "its constitution or laws prior to or at the time such State became a member of the Union," made such a provision, or if its seaward boundary "has been heretofore or is hereafter approved by Congress" [103] as actually extending beyond the 3-mile limit. [99 Cong. Rec. 2896.]

* * * * *

Mr. DOUGLAS. I am afraid that the pending joint resolution puts us in the position of buying a pig in a poke; in other words, under this measure we do not know where the boundaries of the coastal States are, although title to those submerged lands out to such boundaries is claimed to be vested in the States.

I wish to point out that the chairman of the subcommittee, the senior Senator from Oregon [Mr. Cordon], frankly stated, in reply to questions which I addressed to him, that it is not known, without judicial determination, what the various boundaries may be. The record reveals, as I have said, that Texas has hitherto made further claims out to the edge of the Continental Shelf; California, out to a line outside of adjacent islands;

[103] See *supra*, p. 39, fn. 5; p. 105, fn. 25; p. 108, fn. 27.

and Louisiana, to a boundary 27 miles from shore. [99 Cong. Rec. 2916.]

* * * * *

Mr. HOLLAND. * * * So it is very difficult for me to understand why those who oppose the pending joint resolution feel that there is something to fear, if they feel we have no firm case for that boundary. We do not spell out that firm case in the pending measure. In this measure we simply claim the right not be [to?] be deprived of our right before the court and our rights whatever they are in the family of other States to show—if it be a fact—that we have a greater border than 3 miles, as we claim, in the Gulf of Mexico. [99 Cong. Rec. 2923].

* * * * *

Mr. HOLLAND. * * * As further information, I think the Senator from Massachusetts could properly—and I hope he will—write his constituent that if any States receive boundaries reaching 3 leagues into the ocean, it will not be because of this joint resolution, but because of proper legal action taken by the Congress of the United States in 1845 in the case of Texas, and in 1868 in the case of Florida; and that nothing in this joint resolution extends or confirms the boundaries of either of those States. The joint resolution, in equity and fair dealing, merely recognizes their rights to be heard upon the long-existing status and provides that nothing in the joint resolution shall destroy such rights. [99 Cong. Rec. 2933.]

* * * * *

Mr. ANDERSON. I wonder whether the Senator from New York is able to define what the historic

boundary of any State is, when it has been clearly stated that whatever the boundaries are, those are the boundaries, and the court must pass on them. [99 Cong. Rec. 2975.]

* * * * *

Mr. DANIEL. The joint resolution does not undertake to fix the historic boundaries of any State, but it limits them all to the boundaries as they existed at the time each State entered the Union.

* * * * *

Mr. LEHMAN. * * * I realize that Senate Joint Resolution 13 is not specific about just how much of this land we shall give to the State of Texas. [99 Cong. Rec. 2976.]

* * * * *

Mr. HOLLAND. I should like to have the Senator from New Mexico indicate at this time just what part of Senate Joint Resolution 13 he relies upon for his repeated statements that the joint resolution would extend boundaries. As the author of the joint resolution, I have frequently stated, and I now restate, that there is not one word within the joint resolution which would extend boundaries beyond the 3 geographical mile limit of any State of the Union * * *. [99 Cong. Rec. 3035.]

* * * * *

Mr. ANDERSON. * * * Mr. President, it is a little difficult, in discussing the pending joint resolution, to consider the problems of boundaries. I am reminded of a young boy about 6 years of

age who was given a wrist watch by his parents for his birthday. He did not know how to tell time, but he was very proud of the wrist watch, and he went out to show it to the 4-year-old boy living next door. He said, "I have a watch now so that I can tell time." The smaller boy said, "What time is it?" That was a problem for the 6-year-old. He looked at the watch again and shoved it in the other boy's face and said, "There she is." The smaller boy, who could not tell time either, looked at the watch and said, "Shucks if she ain't." [Laughter.] That is the situation we find in respect to boundaries in the pending measure. Whatever they are, they are.

* * * * *

Mr. ANDERSON. * * * The boundary of Texas is fairly simple. There are no islands to cause trouble. It is merely a question of having the representatives of Texas say to the Court, "We think Texas has a boundary 3 leagues from the shore. The Government of the United States thinks our boundary is 3 miles from the shore. A great deal of money is involved in the royalties which come from the oil obtained from that area"—although the amount of royalties obtained from oil which is found in that belt is not nearly so large as some persons would believe—"and we would like to have this question settled."

I hope the State of Texas will do so. I hope its case will be settled. But I say that is a matter the Supreme Court will have to settle and those are questions which must be handled by the Supreme Court. [99 Cong. Rec. 3037.]

* * * * *

Mr. HILL. * * * as I have said, and as the distinguished acting chairman of the committee, the able Senator from Oregon [Mr. Cordon] said on this floor when he was explaining this measure, no one knows where the State boundaries are. No man today knows how far out the State boundaries go, whether they go 3 miles, 5 miles, 10½ miles, or 50 miles. Therefore, no one really knows how much oil and gas is involved in this joint resolution.[104] [99 Cong. Rec. 3196.]

* * * * *

Mr. HOLLAND. I think it would be fair to state in the beginning that each of the States has boundaries, according to the laws under which they came into the Union, and, except as changed in the very minor ways mentioned in section 4 of the joint resolution, the boundaries are the actual legal boundaries that are more loosely spoken of as historic boundaries. They have become historic because they have been for periods of years the legal boundaries of the several States.

* * * * *

Starting with the statement I have just made, that what we are talking about in the beginning is actual legal boundaries which every State has; some by constitution, some by enabling act, and some by their own statute, let us now examine section 4. [99 Cong. Rec. 4094-4095.]

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[104] The possibility of any boundary in excess of three leagues was removed by an amendment introduced by Senator Holland, adding the limitation of three miles in the Atlantic and Pacific and three leagues in the Gulf. 99 Cong. Rec. 4114-4116.

Mr. HOLLAND. * * * I may say to the Senator, before coming to the fourth sentence, which is the sentence applicable to Texas and to the west coast of Florida, that there has been under this measure no extension whatsoever of any boundary line in the case of any State, either Texas or Florida, beyond the 3-geographical-mile limitation.

In the event that Texas and Florida do have a line extending out 3 leagues, which is our contention, and we think we will show that that is a fact, it will not be by reason of any action under the pending joint resolution, but by reason of the fact that such action was taken and legally taken, in the past. * * *

* * * * * *

I may say to the distinguished Senator from Alabama, because I wish to be completely fair and frank, that I am not claiming as a positive fact that either Texas or Florida would, at long last, after litigation, sustain their claims. I believe both would very clearly do so, but the point I am making is that any claim that Texas or Florida have their limits extended by the joint resolution is not correct, because no such result is attempted or sought to be accomplished by the joint resolution. The joint resolution simply saves, without prejudice, the full right to our two States to rely upon action which we claim was legally taken by Congress at the time of the admission of Texas, in 1845, and in 1868, in the case of the restoration of Florida to her seats in the Congress, to claim the right to stand upon these provisions, for whatever they may be worth. If they are strong enough to support our claims, as we think they are, then we should have that right. We do not believe this Congress or any other Congress can legally take

away from the State of Texas or the State of Florida what long ago has been legally granted. [99 Cong. Rec. 4095-4096.]

* * * * * *

Mr. HOLLAND. * * * Under the joint resolution, as it stands, all States which have not done so would be allowed to go out to 3 geographic miles. In the case of the Texas shoreline and the west coast of Florida, regarding which affirmative action going beyond the 3-mile line to the 3-league line has been heretofore taken by the Congress, that situation would simply be preserved, without being affected in the slightest one way or the other. We do not ask that such a boundary be confirmed by this measure. [99 Cong. Rec. 4096.]

* * * * * *

Mr. DANIEL. I may say to the distinguished Senator from New Mexico that I do not know of any fairer way to treat all the States than to confirm their titles to the lands that were beneath the navigable waters within their boundaries at the time they entered the Union. Those are the words used, or "as heretofore approved by the Congress of the United States." When we do that, we are not fixing new boundaries, and we are not changing any boundaries. The boundaries would stand as they have always stood.

They must have existed at the time Texas entered the Union at 3 leagues in the gulf, or this measure will not restore the proprietary rights to that distance; and Florida's boundaries must have been heretofore approved by Congress not hereby approved, but heretofore approved, or Florida would not receive lands under this bill to that distance. [99 Cong. Rec. 4174-4175.]

APPENDIX F

Letter from Luis G. Cuevas, Mexican Foreign Minister, to Percy W. Doyle, British Chargé d'Affaires in Mexico, in reply to the British protest of June 9, 1848, against the boundary provision of Article 5 of the Treaty of Guadalupe Hidalgo.[105]

National Palace, Mexico. November 17, 1848.

The Undersigned, &c. &c. &c., has examined Mr. Percy W. Doyle's Note of the 9th of last June,

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[105] From a photostatic copy of the translation furnished to the British Foreign Office by Mr. Doyle, in the Public Record Office, London. It contains an evident error in the omission of a negative in the first sentence, supplied in the text in brackets. The Spanish text, also from a photostat of the copy furnished by Mr. Doyle and now in the Public Record Office, London, was as follows:

Palacio Nacional, Méjico.
Noviembre 17 de 1848.

El Infrascrito, &c. &c. &c., ha examinado la Nota del Señor Percy W. Doyle fecha 9 de Junio último, en que comunica que el Gobierno de Su Majestad no cree deber reconocer la estipulacion contenida en el Artículo 5° del último Tratado de Paz concluido entre Méjico y los Estados Unidos, que fija que la linea divisoria entre las dos Repúblicas comenzará "en el Golfo de Méjico á tres leguas fuera de tierra frente á la desembocadura del Rio Grande."

En respuesta el Infrascrito debe manifestar al Señor Encargado de Negocios de Su Majestad Británica par conocimiento de su Gobierno que la celebracion de dicho Tratado tuvo por único objeto terminar la guerra que entre ambas Repúblicas existia; y por lo mismo ninguno de sus Artículos ha podido alterar los derechos de las demas naciones. Tales derechos sea sobre la estension del mar territorial, sea sobre cualquiera otro punto se conservan lo mismo que estaban ántes del 2 de Febrero. Por último Méjico jamas pretendió atacar los derechos que tenga la Gran Bretaña ó cualquiera otra Potencia, y asi ninguna tiene justo motivo de queja de una estipulacion concluida para mutua conveniencia de Méjico y los Estados Unidos de America.

El Infrascrito aprovecha &c. &c. &c.

firmado, Luis G. Cuevas.

Al Señor
Percy W. Doyle
&c. &c. &c.

in which he communicates that Her Majesty's Government [do not] think they ought to recognize the stipulation contained in the 5th Article of the late Treaty of Peace concluded between Mexico and the United States, which lays down that the boundary line between the two Republics shall commence "in the Gulph of Mexico three leagues from land in front of the mouth of the Rio Grande."

In reply the Undersigned has to state to Her Britannic Majesty's Chargé d'Affaires for the information of his Government that the celebration of the said Treaty had for it's sole object the termination of the war which existed between the two Republics, and for that reason none of it's Articles could change the rights of other Nations. Such rights, whether they refer to the extent of territorial sea, or whatever other point, remain in the same state as before the 2nd of February. Finally Mexico never pretended to assail the rights which Great Britain or any other Power may have, and consequently none has any just cause of complaint against a stipulation concluded for the mutual convenience of Mexico and the United States of America.

The Undersigned avails himself &c. &c. &c.

signed, Luis G. Cuevas.

APPENDIX G

Letter from President James K. Polk to Andrew Donelson, June 15, 1845. Andrew Donelson Papers (Library of Congress), vol. 10, folios 2068-2070.

Washington City 15th June 1845—

(Confidential)

My Dear Sir:

Your dispatches of the 2d and 4th Int. were received at the Department of State last night. I received also letters of the 3d and 4th from Mr. Wickliffe.—The threatened invasion of Texas by a large Mexican army —is well calculated to excite great interest here, and increases our solicitude concerning the final action by the Congress and Convention of Texas—upon our proposition for annexation. In view of the facts disclosed by you, not only as regards—the approach of an invading Mexican army—but of the open intermeddling of the Brittish charge-d'affaires,—with the question of annexation, I have lost no time in causing the most prompt and energetic measures—to be adopted here—. I am resolved to defend and protect Texas—as far as I possess—the Constitutional power to do so. The dispatches which will be handed to you by *Genl Besancon*, who will leave here to night, with instructions to convey them to you with the least possible delay,—will acquaint you with what has been done. An express messenger will leave at the same time (to-day) for Fort Jessup—bearing orders for the troops—to march immediately to the Mouth of the Sabine,—to be then in readiness to act as you may direct,—under the instructions from the Department of State.—The fine steam vessel—(*The Spencer* one of our revenue cutters)—a small but

most effective War Vessel—with her guns mounted,—has been ordered to proceed at once from New York where she now is—to Galveston—and report to you.—An additional Naval force will be ordered to the Gulph —today or tomorrow.

I suggest to you that it will be very important that the *Convention* of Texas—should on the day they meet pass a general Resolution accepting our terms of annexation. The moment they do this, I shall regard Texas as a part of our Union:—all questions of Constitutional power to defend and protect her—by driving an invading Mexican army out of her Territory—will be at an end,—and our Land and Naval forces will be under orders to do so.—Let the Convention pass this general Resolution—on the 4th of July,—and they can thus proceed in their deliberations in forming their State constitution,—whilst we will protect them agains' their Mexican enemies, stimulated & excited as these enemies have been by Brittish intrigue & influence.—The assent of the Convention is all we want. Let that assent be given,—and we will not wait for the tedious —process—which may occur in passing the new Constitution,—but will feel ourselves fully warranted—to act without that delay.—

In the contingency mentioned in Mr. *Buchanan's* dispatch—viz—that a Mexican army should cross—The Rio Grande,—after the Congress of Texas have given their assent to annexation, but before the Convention have done so, it is submitted to your discretion to judge —of the propriety or necessity—of ordering our Army and Navy to repel the invaders of Texas. If that invasion—in this stage of the action of Texas,—shall be in your judgment calculated to over-awe or shall in fact interfere with or disturb—the free and peaceful deliberations of the Convention—then in my judgment—the public necessity for our interposition—will be such,

—that we should not stand—quietly by—and permit—an invading foreign enemy—either to occupy or devastate any portion of the Texian Territory. Of course I would maintain the Texan title to the extent which she claims it to be, and not permit an invading enemy—to occupy a foot of the soil East of The *Rio Grande*.—I hope however that there will be no necessity to consider of what it may be proper to do under the contingency supposed. Our troops at Fort Jessup—cannot reach the mouth of *Sabine*—before the 4th of July,—(the day the Texas Convention convenes)—and if the assent of that body is promptly given—no question of our power to expel the Mexican army from her soil will exist,—and it will be promptly and efficiently done.—

The Post Master General here—will today issue orders—to employ three Steamers to carry the mail three times a week each way between New Orleans and Galveston—which will greatly facilitate the transmission of information to and from Texas.—You will of course keep us regularly advised of all that occurs in Texas. You will be expected to remain in Texas,—as you were informed by *Mr. Buchanan* in his last dispatch until after the Convention shall adjourn.—

I write you this private letter—in addition to the Public dispatches which you will receive by *Genl Besancon*, not that I deem'd it to be absolutely necessary to do so, but to express to you in this informal manner—my determination to stand by Texas—and defend her in this crisis to the utmost of my constitutional powers.—The people of Texas may be assured too, as I wrote you in a former letter,—that when she becomes a member of our Union,—we will not only defend her but do her full and ample justice.—I have written in great haste, but as my letter is *private* and

not *public*—I will not transcribe it or take time—to put it into better form.

Yours truly,

JAMES K. POLK.

A. J. Donelson Esqr.
Washington, Texas.

P. S. *General Besancon* the bearer of dispatches is a very intelligent gentleman,—and can give you more in detail—the public anxiety now prevailing—in the U. States for the success of the measure of annexation.—The Whig party seem with but few exceptions to have given up their opposition to the measure.—The Genl.—will return immediately,—and will if you desire it be the bearer of dispatches from you to the Government here.—

Yrs. &c.
J. K. P.

P. S. Just as I had finished this letter *Mr. Eldridge* of Texas arrived direct from the *Hermitage*—bringing the melancholy news of the death of *Genl. Jackson.* He died at 6. O-clock P. M. on Sunday the 8th June.—President *Houston* arrived at the Hermitage two hours after he expired.

Yrs. &c.
J. K. P.

Legislative history of reconstruction acts admitting Tennessee, Arkansas, Virginia, Mississippi and Texas to representation in Congress.

1. *Tennessee*

The first of those acts, and the only one not under the Act of March 2, 1867, 14 Stat. 428, was the Act of July 24, 1866, 14 Stat. 364, Joint Resolution H.R. 83, 39th Cong., 1st Sess. It was as follows:

Joint Resolution restoring Tennessee to her Relations to the Union

Whereas, in the year eighteen hundred and sixty-one, the government of the State of Tennessee was seized upon and taken possession of by persons in hostility to the United States, and the inhabitants of said State in pursuance of an act of Congress were declared to be in a state of insurrection against the United States; and whereas said State government can only be restored to its former political relations in the Union by the consent of the law-making power of the United States; and whereas the people of said State did, on the twenty-second day of February, eighteen hundred and sixty-five, by a large popular vote, adopt and ratify a constitution of government whereby slavery was abolished, and all ordinances and laws of secession and debts contracted under the same were declared void; and whereas a State government has been organized under said constitution which has ratified the amendment to the Constitution of the United States abolishing slavery, also the amendment proposed by the thirty-ninth Congress, and has done other acts proclaiming and denoting loyalty: Therefore,

> *Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the State of Tennessee is hereby restored to her former proper, practical relations to the Union, and is again entitled to be represented by senators and representatives in Congress.

There is nothing in that act that can be taken as a general approval of the contents of the Tennessee constitution, and its effect cannot be enlarged by reference to the Act of March 2, 1867, since the latter act came more than seven months later and by its terms applied only to the ten "rebel" States other than Tennessee. 14 Stat. 428. The debates on the Tennessee act show that no general approval of the Tennessee constitution was intended. The debate in the House (Cong. Globe, 39th Cong., 1st Sess., 3974-3981) was concerned almost exclusively with the question of whether the constitution was republican, in view of the fact that it denied voting rights to Negroes. The Senate debate (*id.* 3987-4008) dealt with the same question and the question of whether Tennessee had in fact ratified the Fourteenth Amendment as reported. There was also considerable dispute over the preamble of the act, which everyone agreed would have no operative effect in any event. The following excerpts illustrate the general understanding of the effect of the joint resolution:

> Mr. SHERMAN [Senator from Ohio]. * * *
>
> There is the simple proposition; that Tennessee, by the adoption of the constitutional amendment, by her action for the last two or three years, by her adhesion to the Government, by organizing a government (at the head of which is Governor Brownlow) and a Union Legislature, by acquiescing and submitting to every proposition made by us, by

sending here Senators and Representatives who it is admitted can take the oath of office and are entitled to hold their seats, shall be so declared entitled. We here declare in a few words that Tennessee has complied with all these terms, and then we say in conclusion that she is entitled to representation. * * *

* * * * *

* * * All we say in this resolution is that Tennessee is entitled to admission. [Cong. Globe, 39th Cong., 1st Sess., 3989.]

* * * * *

Mr. COWAN [Senator from Pennsylvania]. * * * Now, it is perfectly evident that what we want to get at here is the admission of Senators and Representatives from Tennessee. The operation of this joint resolution, as it is called, can possibly go no further; it can have no operation outside of that. The only conceivable result which will follow from it will be that Representatives will be admitted into the other House and Senators will be admitted here. That is the whole of it. [*Id.* 4003.]

2. *Arkansas*

The first State to be admitted to representation under the Act of March 2, 1867, was Arkansas, admitted by the Act of June 22, 1868, 15 Stat. 72 (H.R. 1039, 40th Cong., 2d Sess.). Since that act preceded by only three days the act admitting Florida and five other States, it is particularly likely that the congressional intention was the same as to the two acts. The act admitting Arkansas was as follows:

An Act to admit the State of Arkansas to Representation in Congress

Whereas the people of Arkansas, in pursuance of the provisions of an act entitled "An act for the more efficient government of the rebel States," passed March second, eighteen hundred and sixty-seven, and the acts supplementary thereto, have framed and adopted a constitution of State government, which is republican, and the legislature of said State has duly ratified the amendment to the Constitution of the United States proposed by the Thirty-ninth Congress, and known as article fourteen: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of Arkansas is entitled and admitted to representation in Congress as one of the States of the Union upon the following fundamental condition: That the constitution of Arkansas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted, under laws equally applicable to all the inhabitants of said State: *Provided,* That any alteration of said constitution prospective in its effect may be made in regard to the time and place of residence of voters.

That is substantially the same as the provision applicable to Florida (*supra*, p. 331), and like it shows no intention to approve the contents of the constitution. Again, the debates show an understanding that Congress was doing nothing more than providing for the

admission of Senators and Representatives to Congress. The debates in the House (Cong. Globe, 40th Cong., 2d Sess., 2390-2399) concerned chiefly the regularity of the election at which the constitution was ratified, but there was discussion of the franchise provisions of the constitution, as bearing on its republican character (*id.* 2393, 2398-2399), and the right of Congress to impose the "fundamental condition" (*id.* 2397). To a question on the latter point, Representative Pile of Missouri replied (*ibid.*):

> I do not intend to discuss that feature of the bill, but only to answer the objection to the constitution based on the fact that gentlemen have not seen it, and do not know its provisions. I ask to have read the Bill of Rights, the article on the subject of franchise, and the article on the subject of education. These embrace the main features of the constitution, and are the provisions which have been specially attacked by those who have spoken against the bill.

The Clerk thereupon read the Preamble, Article I (Bill of Rights), Article VIII (Franchise) and Article IX (Education) of the Arkansas constitution. Mr. Pile's statement, and the fact that this limited reading was accepted by the House as an adequate basis for proceeding, show that there was no thought of engaging in any comprehensive review of other aspects of the constitution.

The debates in the Senate (Cong. Globe, 40th Cong., 2d Sess., 2436-2440, 2517-2518, 2561-2562, 2600-2609, 2628-2633, 2659-2668, 2690-2701, 2736-2750, 3361-3363) concerned chiefly the conduct of the election by which the constitution was adopted, the power of Congress to impose "fundamental conditions" on the southern States, the loyalty and republican character of the

State government, and the provisions for registration and voting. Beyond that, there was no discussion of provisions of the constitution, except that Senator Buckalew of Pennsylvania, who opposed the bill (Cong. Globe, 40th Cong., 2d Sess., 2750), briefly criticized the relatively large values allowed for homesteads and other property exempt from execution (*id.* 2692-2693), Senator Doolittle of Wisconsin, who also opposed the bill (*id.* 2750), criticized the test oath required for registration to vote (*id.* 2697-2698), and Senator Fowler of Tennessee said that he favored the bill, although there were provisions in the constitution which he did not like (*id.* 2744). Neither Senator Buckalew nor Senator Doolittle evoked any response as to the constitutional provisions which they criticized; evidently, the majority of the Senate considered such discussion unnecessary or inappropriate, as Senator Fowler clearly indicated his feeling that it would be inappropriate to consider the faults that he had found in the constitution. The debate as a whole clearly shows that there was no thought of examining or approving all the provisions of the constitution.

3. *Virginia*

By the Act of April 10, 1869, Congress authorized the President to submit to the voters of Virginia, Mississippi and Texas the constitutions prepared by conventions in those States under the reconstruction laws. 16 Stat. 40. The act also required those States to ratify the Fifteenth Amendment before they would be admitted to representation in Congress. Virginia having ratified the Amendment and its own constitution, it was admitted to representation by the Act of January 26, 1870, 16 Stat. 62 (H.R. 783, 41st Cong., 2d Sess.). That act, so far as now material, read as follows:

An Act to admit the State of Virginia to Representation in the Congress of the United States

Whereas the people of Virginia have framed and adopted a constitution of State government which is republican; and whereas the legislature of Virginia elected under said constitution have ratified the fourteenth and fifteenth amendments to the Constitution of the United States; and whereas the performance of these several acts in good faith was a condition precedent to the representation of the State in Congress: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said State of Virginia is entitled to representation in the Congress of the United States: *Provided* [here followed a requirement that State officers swear (or, as amended by the Act of February 1, 1870, 16 Stat. 63, affirm) that they were not under the disability imposed by Section 3 of the Fourteenth Amendment, with provisions regarding penalties and proofs in case of false swearing]: * * * *And provided further,* That the State of Virginia is admitted to representation in Congress as one of the States of the Union upon the following fundamental conditions: First, That the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: *Provided,* That any alteration of said Constitution,

prospective in its effects, may be made in regard to the time and place of residence of voters. Second, That it shall never be lawful for the said State to deprive any citizen of the United States, on account of his race, color, or previous condition of servitude, of the right to hold office under the constitution and laws of said State, or upon any such ground to require of him any other qualifications for office than such as are required of all other citizens. Third, That the constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State.

As in the other acts, the fundamental effect of this act was to admit the State to representation in Congress. There was no statement that the constitution of the State was approved, and the reference in the first "fundamental condition" is to the Constitution herein *recognized*. The preamble recites nothing more than good faith compliance with the requirements previously laid down by Congress, and the various provisos are all directed to matters of loyalty and protection of civil and political rights of Negroes. On its face, the act contains no indication that the provisions of the State constitution were examined in all their details, much less that they were all approved. Only the "reconstruction" aspects of the constitution were discussed in the debates on this measure [106] or on the similar Senate resolution which it replaced.[107] The subjects so discussed included the conduct of the

[106] H.R. 783, 41st Cong., 2d Sess., Cong. Globe, 41st Cong., 2d Sess., 400-407, 408-410, 430-449, 478-503, 512-518, 539-549, 563-575, 597-614, 634-644, 715-720; App. 44-49, 52-55, 57-58, 59-62, 69-72.

[107] S. Res. 85, 41st Cong., 2d Sess., Cong. Globe, 41st Cong., 2d Sess., 325-336, 350-361, 380-394, 416-424, 458-478, 507-512.

ratification election, the validity of the reconstruction laws, the status of the States under reconstruction, the power of Congress to impose fundamental conditions, the loyalty oath to be required of voters or of officials, county organization, non-discrimination with respect to voting, school privileges and jury duty, protection of civil and political rights and assurance of a republican government, the loyalty of the State government and the degree of public order existing in the State, the State's ratification of the Fifteenth Amendment and the possibility that it might attempt to rescind that ratification. It is evident that Congress was wholly preoccupied with such matters and was not examining the constitution in other respects. The following passages from the debates are illustrative:

> Mr. FITCH [Representative from Nevada]. * * *
>
> Sir, we said in effect last April that if Virginia would ratify the fourteenth and fifteenth amendments to the Federal Constitution and adopt a State constitution republican in form we would admit her. She has fulfilled these conditions. She has adopted a State constitution as republican as that of Massachusetts * * *. [Cong. Globe, 41st Cong., 2d Sess., 479.]
>
> * * * * * *
>
> Mr. STEVENSON [Representative from Ohio]. * * *
>
> First, I have no doubt of the right and the power of the Congress of the United States to pass any measure in regard to the admission of Virginia that we may deem proper to secure equal rights and republican government to all the people of that State. * * * [*Id.* 488.]

When Senator Drake of Missouri proposed the two provisos, ultimately adopted (*id.* 643), restricting Virginia's right to amend its constitution as to qualifications for voting or holding office, Senator Morton of Indiana questioned whether that might not imply a right to make changes of any other character. Senator Drake replied:

> I will ask the honorable Senator to allow me to say in reference to that matter that Congress in regard to all these conditions has only undertaken to deal with political rights, and I undertake to deal only with them in these amendments. [*Id.* 568.]

In other words, there would be no implication as to other subjects because Congress was not concerning itself with them.

Immediately thereafter, Senator Morton proposed the preamble, substantially as it was adopted, and Senator Drake said:

> Now, the point that I wish to present to the consideration of my friend from Indiana is this: that the Constitution of the United States gives to Congress the power to guaranty to every State a republican form of government, and that is all that his proposed preamble to this bill sets forth in regard to the constitution of Virginia. If we go beyond that we go into a *terra incognita*. If we go beyond that we get into a region where there will be endless conflict. * * * [*Id.* 569.]

The following statements were made during the Senate debates on the Senate resolution, S. Res. 85, which was like the measure actually passed:

> Mr. STEWART [of Nevada]. * * *
> The constitution of Virginia I have before me.

It is certainly a republican constitution. * * * [*Id.* 325.]

* * * * *

Mr. SUMNER [of Massachusetts]. Now I will read what was in the bill of March 2, 1867, entitled "An act to provide for the more efficient government of the rebel States." It declares in the preamble that "it is necessary that peace and good order should be enforced in said States"—strong language that—"until loyal and republican State governments can be legally established." That is what Congress is to require. To that end Congress must look into the circumstances of the case; it must consider what the condition of the people there is, whether this new government is loyal, whether it is in the hands of loyal people. * * * [*Id.* 360.]

* * * * *

Mr. SCOTT [of Pennsylvania]. * * *

* * * Congress has assumed—and it is the vital spirit running through all the reconstruction acts—Congress has exercised the power contained in them, on the assumption that there is an authority vested in this Government to cure every evil resulting from the attempt of treason to destroy it. * * * [*Id.* 384.]

Speaking of the Act of April 10, 1869, which had authorized the constitutions of Virginia, Mississippi and Texas to be submitted to the voters of those States, Senator Trumbull of Illinois said,

At the last session of Congress we passed upon her constitution. It was then before us; we examined

it; we passed a law authorizing the President of the United States * * * to submit that constitution which we had examined and found republican in form to the voters of Virginia. * * * [*Id.* 418.]

The debates on that act [108] show no discussion whatever of the provisions of any of the three constitutions referred to. The only subjects of discussion were the validity of the reconstruction laws, the suspension of State laws during reconstruction, and Negro suffrage and the requirement that the States ratify the Fifteenth Amendment. Thus in the case of Virginia it likewise appears that there was no general examination or approval of the provisions of its constitution.

4. *Mississippi*

Mississippi was admitted to representation in Congress by the Act of February 23, 1870, 16 Stat. 67 (H. R. 1096, 41st Cong., 2d Sess.). That act is identical with the act admitting Virginia, as supplemented (*supra*, p. 415), and must be understood as having the same effect. The congressional debates on the act [109] were devoted almost exclusively to discussion of the status of States under reconstruction and the validity and wisdom of fundamental conditions imposed by Congress. There was brief mention of four provisions that had been submitted to the voters separately, of which three, prescribing a loyalty oath for voters and loyalty qualifications and oath for office holders, were rejected and one, forbidding lending State credit to private corporations, was adopted. Cong. Globe, 41st Cong., 2d Sess., 1173-1174. Beyond that, the only men-

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[108] H.R. 405, 41st Cong., 1st Sess., Cong. Globe, 41st Cong., 1st Sess., 633-636, 653-657, 658-662, 699-700.

[109] Cong. Globe, 41st Cong., 2d Sess., 1013-1014, 1173-1184, 1209-1219, 1252-1261, 1281-1294, 1322-1335, 1355-1366; App. 117-122.

tion of provisions of the State constitution was of the clauses regarding voting, office holding, and education, incidental to discussion of the fundamental conditions forbidding change of those provisions. Those conditions were discussed by both their proponents and opponents in the light of the obligation of the United States to guarantee to the State a republican government, illustrating the exclusive preoccupation of Congress with that limited subject. Thus, Senator Willey of West Virginia, opposing the conditions, said:

> Now, if these fundamental conditions contain nothing but what is necessary and essential to the republican form of government in a State, then we have a better guarantee to the same effect than a a legislative enactment can give in the Constitution itself. If they include and require * * * more than is essential to maintain a republican form of government in a State, then we have no rightful authority to impose them on a State. * * * [Cong. Globe, 41st Cong., 2d Sess., 1214.]
>
> * * * * *
>
> The very bill on its face enunciates the fact that without these conditions the constitution of Mississippi is republican. Well, sir, what more can Congress require? What more can be required by the United States, upon whom rests the obligation to guaranty to this State a republican form of government? [*Id.* 1331.]

Senator Howard of Michigan invoked the same consideration in supporting the conditions:

> The Constitution of the United States in terms imposes upon Congress the duty of guarantying to every State in this Union a republican form of

government. If Congress may annex fundamental conditions of a political character, such as are in the bill before us, then it seems to me that they are carrying out and executing the authority and the duty of guarantying a republican government to the State. I do not know of any other clause in the Constitution upon which to base this right. * * * [*Id.* 1218.]

* * * * *

* * * I say that if Congress shall see fit, in order to maintain in any one particular State republican government, to provide for a common-school system by which the elements of human knowledge shall be diffused among the population of that State, Congress believing that this would be a proper and effectual means for perpetuating a republican form of government in that State, that it is the right of Congress to do so. Why? Because Congress is bound to see to it that a republican form of government is established and maintained in that State, and they are the proper judges of the means to be employed to execute the power intrusted to them. [*Id.* 1324-1325.]

Similarly, Senator Morton of Indiana said:

The Constitution clearly contemplates that in securing or guarantying a republican form of government we may use such means as may be necessary for that purpose. And now I will ask my friend from Minnesota, [Mr. Norton,] in securing a republican government in the State of Mississippi, what better means can we employ than the universal education of that people? [*Id.* 1254.]

The general attitude of Congress, that reconstruction involved essentially the problem of establishing republican governments, and particularly of protecting suffrage, was expressed by Senator Sherman of Ohio:

> A few words in regard to the particular clause [for universal male suffrage] in the act of March 2, 1867. Before that became the law, every member of the Republican party in this Senate, and one Democrat, at least, agreed that suffrage should be the basis of reconstruction in the South. [*Id.* 1181.]

While the debates contain occasional expressions of general approval of the Mississippi constitution, they must be understood in a more limited sense in the light of the tenor of the discussions as a whole or, in some cases, of the immediate context. Thus, Senator Trumbull of Illinois said,

> The constitution contains clauses securing the rights of voters, and also guarantying education. It is acceptable in every particular. [*Id.* 1362.]

It is evident that by "every particular" he referred only to those particulars which Congress was considering, and which he had just specified.

Similarly, it is evident that Senator Stewart of Nevada was focusing his attention on a narrower aspect of the constitution than some of his language, in isolation, might suggest, when he said:

> I believe we are agreed upon some things with regard to Mississippi, and the first is that she has organized a State government republican in form * * *. She comes here in excellent shape. I believe we all congratulate ourselves upon the condition in which we find Mississippi as she applies for ad-

mission. She has also an excellent constitution. No one has found fault with that; and particularly she has an excellent provision with regard to common schools. [*Id.* 1329.]

All of the evidence of the debates is that in the case of Mississippi, as was true of the other States already considered, Congress was not concerned with its constitutional provisions except as they related to the immediate problems of reconstruction.

5. *Texas*

Texas was admitted to representation in Congress by the Act of March 30, 1870, 16 Stat. 80 (H.R. 1536, 41st Cong., 2d Sess.), identical in terms to the acts admitting Virginia and Mississippi. The debates on that act [110] were concerned almost exclusively with a proviso, added by the House and eliminated by the Senate, that the act should "not affect in any manner the conditions and guarantees upon which the State of Texas was annexed and admitted as a State." Cong. Globe, 41st Cong., 2d Sess., 1969. The purpose of the proviso was to make clear that the Act was not intended to supplant the conditions upon which Texas was admitted to the Union. It was excluded by the Senate out of fear that it might be thought to revitalize the stipulation that new States formed out of Texas, south of the Missouri Compromise line, could be slave states. Cong. Globe, 41st Cong., 2d Sess., 2233, 2272. Only two comments were made on the Texas constitution. Representative Beck of Kentucky said (*id.* 1970), "* * * everybody admits that the State of Texas has complied with every condition which has been imposed upon her, and that her constitution is as thoroughly

[110] Cong. Globe, 41st Cong., 2d Sess., 1969-1971, 1961, 2233, 2234, 2271-2272, 2281, 2291-2294.

republican as that of any State in the Union." In the Senate, when an inquiry was put as to why the Judiciary Committee had held the measure under consideration for two weeks, Senator Trumbull of Illinois, chairman of the committee, explained that the committee had been busy on other matters, and also was concerned about the House proviso. He then added:

> Then there are clauses in the constitution of Texas which forfeit lands, and there are several provisions of the constitution which the Committee on the Judiciary, if its opinion should be considered worth anything on the subject, think that there ought to be some provision in regard to. [*Id.* 2233.]

He did not explain what those provisions were. The committee made no report, as the Senate voted to discharge it from further consideration of the bill (*id.* 2271), and the constitution was not mentioned again in the debates.

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NO. 10, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA,
Plaintiff

v.

STATES OF LOUISIANA,
TEXAS, MISSISSIPPI, ALABAMA AND FLORIDA

BRIEF FOR THE STATE OF ALABAMA IN OPPOSITION TO MOTION FOR JUDGMENT ON AMENDED COMPLAINT

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INDEX

	Page
Question Presented	1
Claim of State of Alabama	1, 2
Basis for Claim of Alabama	2
Historical Boundaries of Alabama	2, 3, 4, 5
Argument	8
Conclusion	13
Proof of Service	15
Appendix	16

CITATIONS

Florida v. Georgia, 17 How. 478	11
Harcourt v. Gaillard, 25 U. S. 524	8
Irvin v. Mayor, etc., of Mobile, 57 Ala. 6	5
Louisiana v. Mississippi, 202 U. S. 1	10
Oklahoma v. Texas, 252 U. S. 372	11
Pope v. Blanton, 10 F. Supp. 18	5
2 White, New Collection of Laws, Charters and Local Ordinances of Great Britain, France and Spain (1839) 292	8
Vattel, The Law of Nations, Sec. 289,	9
81 C. J. S., States, Section 18, at page 918	10

CONSTITUTIONS AND STATUTES

	Page
Submerged Lands Act, 67 Stat. 29	16
Act creating Alabama territory, 3 Stat. 371	2
Alabama Enabling Act, 3 Stat. 489	3
Resolution Admitting Alabama to Union, 3 Stat. 608	4
Description of Alabama boundaries, Constitution 1901	4
Alabama Constitution approved by Congress, June 25, 1868	4
Act. No. 77, General and Loc Acts of Alabama 1956, page 111	5
Act. No. 158, General and Local Acts of Alabama 1956, page 24	6
Act Establishing Mississippi Territory, 1 Stat. 549	6
Resolution for temporary occupation of territory, 3 Stat. 471	7
Act to Enlarge Mississippi Territory, 2 Stat. 734	7
Act authorizing President to occupy West Florida, 3 Stat. 472	7
Proclamation by King of Great Britain relative to boundaries of West Florida	7, 8

Page

Cession of Floridas to Spain,
3 Fla. Stats. (1941) 101 8

Cession of Floridas to United States,
8 Stat. 252, 254 8

Act fixing southern boundary of Mississippi,
3 Stat. 348 11

APPENDIX

Submerged Lands Act 16

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UNITED STATES OF AMERICA,

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Defendants

BRIEF FOR THE STATE OF ALABAMA IN OPPOSITION TO MOTION FOR JUDGMENT ON AMENDED COMPLAINT

QUESTION PRESENTED

Whether the United States is entitled against the State of Alabama to a judgment on the pleadings fixing its rights to the lands, minerals and other things underlying the sea more than three geographic miles seaward from the ordinary low-water mark and from the outer limit of inland waters on Alabama's coast and extending seaward to the edge of the continental shelf.

CLAIM OF STATE OF ALABAMA

The State of Alabama claims all land, minerals, natural resources and other things, permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward from the coast line of the State of Alabama three marine

leagues into the Gulf of Mexico. Coast line, as above used, means the line of ordinary low water along that portion of the coast which is in direct contact with the sea and the line marking the seaward limit of inland waters.

BASIS FOR CLAIM OF ALABAMA

Alabama claims that the pleadings show, by virtue of the Submerged Lands Act, Public Law 31, 83d Congress, 1st Session, approved May 22, 1953, 67 Stat. 29, and the admitted historical boundaries as shown when Alabama was a territory, when admitted to the Union, and again in 1868, when admitted to representation in Congress, that its claim is sustained rather than the claim of the United States.

HISTORICAL BOUNDARIES OF ALABAMA

Before admission to the Union, Alabama was a territory established by Act of Congress, dated March 3, 1817. 3 Stat. 371. Its boundary as a territory was described as follows:

> "That all that part of the Mississippi territory **which lies within the following boundaries,** to-wit: beginning at the point where the line of the thirty-first degree of north latitude intersects the Perdido River, thence east to the western boundary line of the State of Georgia, thence along said line to the southern boundary line to the State of Tennessee, thence west along said boundary line to the Tennessee River, thence up the same to the mouth of Bear Creek, thence by a direct line to the northwest corner of Washington Coun-

ty, thence due south to the Gulf of Mexico, **thence eastwardly, including all the islands within six leagues of the shore,** to the Perdido River, and thence up the same to the beginning, shall for the purpose of a temporary government, **constitute a separate territory, and be called 'Alabama.'"** (Emphasis supplied)

The Act to enable the people of Alabama territory to form a constitution and state government, and for admission of such state into the Union on an equal footing with the original states, described the boundary as follows:

> **"That the said state shall consist of all the territory included within the following boundaries,** to-wit: Beginning at the point where the thirty-first degree of north latitude intersects the Perdido river; thence east, to the western boundary line of the State of Georgia; thence along said line, to the southern boundary line of the State of Tennessee; thence, west, along said boundary line, to the Tennessee river; thence up the same, to the mouth of Bear creek; thence by a direct line, to the northwest corner of Washington County; thence, due south, to the Gulf of Mexico; **thence, eastwardly, including all islands within six leagues of the shore,** to the Perdido river; and thence, up the same to the beginning." (Emphasis supplied) 3 Stat. 489.

The above descriptions were subsequently changed to provide a line from the northwest corner of Washington County "southwardly, along the line

of the State of Mississippi to the Gulf of Mexico." This was done to avoid encroachment on the Counties of Wayne, Greene and Jackson in the State of Mississippi. 3 Stat. 489.

Alabama was admitted to the union by resolution of Congress approved December 14, 1819. 3 Stat. 608. After the change in the southern boundary line as aforesaid, the following description of the boundaries of Alabama appeared in every Constitution of Alabama, including Section 37, Constitution of Alabama 1901:

> "The boundaries of this state are established and declared to be as follows, that is to say: Beginning at the point where the thirty-first degree of north latitude crosses the Perdido river; thence east, to the western boundary line of the State of Georgia; thence along said line to the southern boundary line of the State of Tennessee; thence west, along the southern boundary line of the State of Tennssee, crossing the Tennessee river, and on to the second intersection of said river by said line; thence up said river to the mouth of Big Bear creek; thence by a direct line to the northwest corner of Washington County, in this state, as originally formed; thence southwardly, along the line of the State of Mississippi, to the Gulf of Mexico; thence eastwardly, including all islands within six leagues of the shore, to the Perdido river; thence up the said river to the beginning. . ."

On June 25, 1868 (15 Stat. 73), Congress passed an act entitled, "An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Ala-

bama and Florida, to Representation in Congress." This Act recited that these states had adopted Constitutions in accordance wih the Act of March 2, 1867. **Pope v. Blanton**, 10 F. Supp. 18; **Irwin v. Mayor, Etc., of Mobile**, 57 Ala. 6.

The Constitution of Alabama, which was approved by Congress and which became operative and obligatory in Alabama on the 25th day of June, 1868, contained, in pertinent part, the same description as the Enabling Act and all other Constitutions of the State of Alabama, namely "thence eastwardly, including all islands within six leagues of the shore, to the Perdido river."

Thus, before admission to the union, at the time of admission to the union, and subsequent to admission to the union, Congress has approved Alabama's southern boundary as including all islands within six leagues of the shore.

The Legislature of Alabama, by Act. No. 77, General and Local Acts 1956, page 111, construed the above historical boundary of Alabama by providing, in pertinent part, as follows:

> "The Director of Conservation, on behalf of the State, is hereby authorized to lease, upon such terms as he may approve, any lands or any right or any interest therein under any navigable streams or navigable waters, bays, estuaries, lagoons, bayous or lakes, and the shores along any navigable waters to high tide mark, and submerged lands in the Gulf of Mexico **within the historic seaward boundary of this State, which is hereby declared to extend seaward six leagues from the land bor-**

dering the Gulf, for the exploration, development and production of oil, gas and other minerals, or any one or more of them, on, in and under such lands; and such lands or interest therein for such purposes shall be supervised and managed by the Department of Conservation." (Emphasis supplied)

This Declaration by the Legislature of Alabama was not an extension of the State's historical boundaries, but was instead its construction of what the description, describing the southern boundary of Alabama meant.

This is true also as to Act. No. 158, General and Local Acts of Alabama 1956, page 24, wherein the historical seaward boundary of Alabama is declared to extend seaward six leagues from the land bordering the Gulf.

On April 7, 1798, 1 Stat. 549, C 28, an act was approved for an amicable settlement of limits with the State of Georgia, and authorizing the establishment of a government in the Mississippi Territory, which read in part: "That all that tract of country bounded on the west by the Mississippi; on the north by a line to be drawn due east from the mouth of the Yasous to the Chattahoochee; on the east by the river Chattahoochee; on the south by the thirty-first degree of north latitude, shall be, and hereby is consituted one district, to be called the Mississippi Territory." This was in conformity with the treaty between Spain and the United States of October 27, 1795. Maps of that date, and subsequently, show that the admitted rights of the United States did not at the time extend south of the thirty-first degree of North latitude at that point.

By resolution, approved January 15, 1811, it was specifically declared that the United States could not, without serious inquietude, see any part of the territory adjoining the southern border of the United States pass into the hands of any foreign power, "and that a due regard to their own safety compels them to provide, under certain contingencies, for the temporary occupation of the said territory." 3 Stat. 471.

May 14, 1812, an Act of Congress was passed, 2 Stat. 734, C. 84, to enlarge the boundaries of the Mississippi Territory, which used the following langauge: "That all that portion of the territory lying east of the Pearl river, west of the Perdido, and south of the thirty-first degree of latitude, be, and the same is hereby annexed to the Mississippi Territory," etc. The country described was not at the time in the possession of the United States, and on February 12, 1812, Congress authorized the President to occupy and hold all that tract of country called **West Florida**, which lies west of the river Perdido, not now in possession of the United States. The President was further authorized to employ such parts of the military and naval forces of the United States as deemed necessary to accomplish said purpose. 3 Stat. 472.

East and West Florida were on February 10, 1763, ceded by Spain to Great Britain (see Definitive Treaty of Friendship and Peace between Spain and Great Britain). While Great Britain was seized and possessed of the Floridas, the King of Great Britain, on October 7, 1763, by proclamation provided as to West Florida the following:

> "Thirdly, the government of West Florida bounded **to the southward by the Gulf of Mexico, including all islands within six**

leagues of the coast, from the river Apalachicola to lake Pontchartrain; to the westward by the said lake, the lake Maurepas, and the river Mississippi; to the northward by a line drawn due east from that part of the river Mississippi which lies in thirty-one degree north latitude, to the river Apalachicola or Chattahoochee, and to the eastward by the said river." (Emphasis supplied) See 2 White, New Collection of Laws, Charters and Local Ordinances of Great Britain, France and Spain (1839) 292). **Harcourt v. Gaillard,** 25 U.S. 524.

The Floridas were ceded back to Spain by Great Britain by the "Definitive Treaty of Peace and Friendship" signed at Versailles on September 3, 1783, under the description of "Eastern Florida as well as Western Florida." 3 Fla. Stats. (1941) 101.

By the treaty of 1819, Spain formally ceded East and West Florida to the United States, which treaty was ratified in 1821. 8 Stat. 252, 254.

ARGUMENT

The State of Alabama, as heretofore shown, consisted on the south of that part of the Mississippi territory west of the Perdido and east of the State of Mississippi. The southern boundary of Alabama was a part of West Florida, which was described by proclamation of the King of Great Britain in 1763 as bounded to the southward by the Gulf of Mexico, including all islands within six leagues of the coast. The pertinent part of West Florida was **taken** by the United States under the said resolution of January 15, 1811, and the Acts of Congress, under dates of

May 14, 1812, and February 12, 1812, **for security reasons.** The **taking** was not settled with Spain until the treaty with Spain, entered into on February 22, 1819, and ratified February 19, 1821. The land and sea area so taken was attached to the Mississippi territory from which Alabama as a territory and state was formed.

Congress had the right to attach this **taken** land and sea area which the naval and military forces of the United States were pledged to defend for security reasons to the Mississippi territory from which Alabama was formed. Vattel, **The Law of Nations,** Sec. 289; see also Common Brief of Defendant States.

There was no rule of foreign policy or International Law as to a three-mile belt at these times and even if in existence would not be applicable as to the land and sea area which the United States took for security reasons. ". . . but between nation and nation the most reasonable rule that can be laid down is that in general the sovereignty of a state over its marginal waters extends as far as is necessary for its safety and as far as it can be effectively maintained." Vattel, **The Law of Nations,** supra.

The main question presented here is the proper construction of the following description of Alabama's southern boundary, namely, "thence due south to the Gulf of Mexico, thence eastwardly, including all islands within six leagues of the shore."

Alabama contends that it means that the line runs southwardly along the line of the State of Mississippi to a point in the Gulf of Mexico six leagues from shore and thence eastwardly six leagues from and parallel to the shore to a point where said line

intersects an extension of the Perdido River into the Gulf of Mexico, thence northwardly along the Perdido River extended to the point of beginning.

Alabama's Enabling Act provides "that the said state shall consist of all the territory **included within the following boundaries**, to-wit: . . ." To include all the territory and the islands within six leagues of shore, the line must of necessity go six leagues out from shore to do so.

> ". . . Where a state line is described to run so as to include all of the islands in a body of water, such a description is not a direction so to run it as to exclude the intermediate waters; the boundary is not to be determined by running the boundary along the coastline at low water mark until it reaches points opposite the several islands and thence running lines to and around such islands and returning along the same lines to the points of departure from the low-water mark, excluding all the water between the islands, and between them and the low-water mark on the opposite coastline; rather the line is to be a continuous line inclosing all of the specified islands without traversing lands or waters not included in the territorial limits of the state." 81 C.J.S., States, Section 18 at page 918.

There is another reason also strongly suggesting the correctness of Alabama's contention as to the proper southern boundary.

Mississippi on the south runs ". . . thence westwardly including all the islands within six leagues of the shore. . ." In **Louisiana v. Mississippi**, 202 U. S. 1,

the State of Louisiana filed a bill against the State of Mississippi, October 27, 1902, to settle a boundary line beween the two states. That was over fifty-five years ago and at a time when oil had not be-clouded the thinking of some advocates. Louisiana contended that the Mississippi line ". . . would in effect start westward from a point **eighteen miles south of the coastline.**" (Emphasis supplied) Mississippi contended that the boundary line as fixed by Act of Congress, 3 Stat. 348, gave to her "all lands under the waters south of her well defined shore line **to the distance of six leagues from said shore** at every point between the Alabama line and the most eastern function of Pearl river with Lake Borgue, including all islands within said limit." (Emphasis supplied)

If the United States had thought then as it does now that International Law or National Foreign Policy prevented such constructions by Louisiana and Mississippi as to Mississippi's southern boundary, it should have intervened in said suit.

The United States, when interested, may intervene in a boundary suit between two states, not only for the purpose of being heard in the argument but also with reference to the introduction of evidence. **Florida v. Georgia,** 17 How. 478; **Oklahoma v. Texas,** 252 U. S. 372. Then again:

> ". . . But under our government, a boundary between two states may become a judicial question, to be decided in this court. And when it assumes that form, the assent or dissent of the United States cannot influence the decision. The question is to be decided upon the evidence adduced to the court; and that decision, when pronounced, is conclus-

> **ive upon the United States,** as well as upon the states that are parties to the suit. . ." (Emphasis supplied) **Florida v. Georgia,** supra.

It seems that fifty-five years ago the United States did not feel that the contentions of Louisiana and Mississippi, as to the starting point westwardly of Mississippi's southern boundary, interfered with national foreign policy or were in conflict with International Law, but now since oil has been discovered, it does. Alabama's southern boundary runs eastwardly from the same point that Mississippi's runs westwardly.

The historical southern boundary claim of Alabama, when sustained by this court, will be sufficiently far distant to embrace the three marine leagues from coast as provided for in the Submerged Lands Act.

It is true that the claims of Texas and Florida are the ones more frequently mentioned before the Congress prior to the passage of the Submerged Lands Act. Their senators were for the bill while Alabama's two senators were not. This Act, however, applies to all the defendant states and each is given the right to show a boundary sufficiently far distant to embrace three marine leagues from coast.

It is to be noted, however, that before the passage of the Submerged Lands Act, Alabama's claim was presented to the Committees on the Judiciary by Governor James E. Folsom's legal representative, who on his behalf stated Alabama's claim in pertinent part as follows:

"Alabama has 199 miles of coastline. Alabama claims a distance, under the grant by Spain of six marine leagues, or about 20 miles, south into the sea from the shore line. This includes such islands as Dauphin, which is a distance of 3 miles south from the mainland; Petit Bois Island, which is a distance of 16 miles south from the shore line of the mainland; and other islands." See Joint Hearings before the Committees on the Judiciary, Eightieth Congress, Second Session on R. 1988 and similar house bills, page 816.

CONCLUSION

Alabama says that for the reasons stated the motion of the United States for judgment on the pleadings should be denied. If the court feels that Alabama can have full relief under the answer, without the cross-bill, then it is not insisted upon; otherwise it is. The Submerged Lands Act itself is authority for the cross-bill. To hold otherwise will be to say that the states could never establish boundary and could never know judicially what each has under the Act, unless the United States first brought suit.

Alabama contends, however, that from the pleadings alone, as they now exist, and without the cross-bill, it is shown by the descriptions of the southern boundaries of the various defendant states that each is entitled, under the Submerged Lands Act, to three marine leagues from coast.

To uphold the claim of the United States, this court must hold that Congress passed the Submerged Lands Act knowing it was meaningless as to state

ownership or rights up to three marine leagues from coast. This, in Alabama's judgment, the court will not do.

Congress did not do a meaningless and futile act, and the equities of this case demand that each defendant state be given three marine leagues from coast.

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PROOF OF SERVICE

I, John Patterson, Attorney General of Alabama, certify that on the ..... day of August 1958, I mailed copies of the foregoing brief to the Attorney General and the Solicitor General of the United States, respectively, at the Department of Justice Building, Washington, D. C., and to the Attorneys General of the States of Texas, Louisiana, Mississippi and Florida.

JOHN PATTERSON

Attorney General of Alabama

APPENDIX

Submerged Lands Act, May 22, 1953, 67 Stat. 29, 43 U.S.C., Supp. V, 1301-1315.

AN ACT

To confirm and establish the titles of the States to lands beneath navigable waters within the State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Submerged Lands Act."

TITLE I

Definition

Sec. 2. (43 U.S.C., Supp. V, 1301). When used in this Act —

(a) The term "lands beneath the navigable waters" means —

* * * * *

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles dis-

tant from the coast line of each such state and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles * * *;

* * * * * *

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

* * * * *

TITLE II

Lands Beneath Navigable Waters Within State Boundaries

Sec. 3. (43 U.S.C., Supp. V, 1311) Rights of The States. —

(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located and the respective grantees, lessees, or successors in interest thereof;

(b) (1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States hereby releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the

Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on the effective date of this Act, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

(c) The rights, powers, and title hereby recognized, confirmed, established, and vested in and assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease, and such rights, powers, and titles are further subject to the rights herein now granted to any person holding any such lease to continue to maintain the lease, and to conduct operations thereunder, in accordance with its provisions, for the full term thereof, and any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued such lease: Provided, however, That, if oil or gas was not being produced from such lease on and before December 11, 1950, or if the primary term of such lease has expired since December 11, 1950, then for a term from the effective date hereof equal to the term remaining unexpired on December 11, 1950, under the provisions of such

lease or any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued, such lease * * *;

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Sec. 4. (43 U.S.C., Supp. V, 1312) Seaward Boundaries. — The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

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Sec. 9. (43 U.S.C., Supp. V, 1302) Nothing in this Act shall be deemed to affect in any wise the rights of the United States to the natural resources

of that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 2 hereof, all of which natural resources appertain to the United States, and the jurisdiction and control of which by the United States is hereby confirmed.